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tober Term, 1912. No,
169 - 186[illegible]

184 I.A. 11

WILLIAM BRAND, dministrator of the Estate of CHARLES BRAND, Deceased,

Defendant in Error,

vs.

W. IRVING OSBORNE, D. B. HANNA and GEORGE G. MOORE as Receivers of the CHICAGO & MILWAUKEE ELECTRIC RAILROD COMPANY, a corporation,

Plaintiffs in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE F. A. SMITH DELIVERED THE OPINION OF THE COURT.

Defendant in error, William Brand, as administrator of the estate of Charles Brand, deceased, commenced an action against W. Irving Osborne, D. B. Hanna and George G. Moore as receivers of the Chicago & Milwaukee Electric Railroad Company, plaintiffs in error, to recover damages for the alleged wrongful death of plaintiff's decedent.

The case was tried upon an amended declaration consisting of seven counts, all of which alleged that plaintiff's intestate was in the exercise of ordinary care for his own safety and that the defendants, plaintiffs in error, were guilty of negligence in the following particulars, namely; the charge in the first and second counts was that they carelessly, negligently and improperly ran, operated, maintained, managed and controlled the car which ran into and killed Charles Brand; the third count averred a violation of an ordinance of the village of Winnetka limiting the speed of trains to eight miles an hour, and in the fourth count the defendants were charged with a violation of an ordinance limiting the speed to eighteen miles an hour at street

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crossings and fifteen miles an hour on other portions of the railway; in the fifth count there was alleged a general ordinance regulating the speed of trains through the village; requiring an alarm to be sounded when approaching a street crossing and that the servants of the defendants failed to sound an alarm; and the sixth count repeats the averments of the fourth and fifth counts. The seventh count charges that the defendants failed to provide and equip their cars with proper machinery and appliances for stopping and failed to keep the same in good repair and condition.

It appears from the evidence in the record that Charles Brand, plaintiff's intestate, had been driving a carriage owned by his father, which carriage was used in meeting suburban trains arriving at the Winnetka station of the Northwestern Railway for the purpose of procuring passengers for hire to be taken to their various homes in the village. The decedent had been engaged in this work for two years and was thoroughly familiar with the surroundings and location. On the night that he was killed, he procured a passenger from one of the suburban trains shortly after six o'clock in the evening and drove the passenger to her home some three or four blocks from the station and east of the electric railway tracks(operated by the plaintiffs in error), and was returning to the railroad station for the purpose of meeting another train due very shortly. He was driving in a westerly direction on Oak street, intending to cross the tracks of the electric road on his way to the Northwestern depot. It was then about 6:20 in the evening of the fourth day of November, 1909, and it was dark. The car which ran into the rig was southbound on the west track of the electric road.

There is no controversy in the evidence as to the following facts: that the car stopped at the Elm street station, which was 625 feet north of Oak street where the accident happened; that the car was equipped with a powerful electric searchlight which was burning at the time and which could have been seen

on a straight track at a distance of at least a mile and that the car was lighted up brightly inside as such cars usually were. At the same time that this car was approaching from the north, a northbound car on the electric line, also equipped with a powerful headlight which was burning, was just starting from the Oak street station which was about 100 feet south of the south line of Oak street, and was proceeding slowly toward Oak street, and until the rig driven by the deceased got into the glare of the headlight on this car, it was not seen by any witness.

It appears from the evidence that the view which the deceased had of the approaching southbound car from the north was unobstructed by anything except a few trees, from which the leaves had fallen, for at least 300 feet east of the intersection of Oak street and the track upon which the car was running, and that there was a clear uninterrupted view from that point to a point on the track on which the car was running, 340 feet northwest of the intersection of Oak street and the electric track, or from the place where the accident happened. When the deceased reached a point 345 feet from the place of the accident, he could see the car when it was more than 340 feet north of the point of the accident, and the closer the deceased came to the track the more extended his view of the track upon which the car from the north was approaching the crossing. When he was within 50 or 60 feet of the point where the accident occurred, he would have a clear view up the electric tracks for at least three long blocks, or over 1000 feet.

The only obstruction to the view of the approaching car as above indicated was a row of trees, about eighteen inches in diameter, located on the north side of Oak street. The trees were from 21 to 22 feet apart.

The jury returned a verdict against the defendants, plaintiffs in error here, for the sum of $2000, and judgment was

entered on the verdict. This writ of error is sued out to reverse that judgment.

Upon a careful consideration of the evidence, a majority of the court has reached the conclusion that the plaintiff's intestate, Charles Brand, was guilty of such contributory negligence as to bar a recovery and that he did not exercise ordinary care for his own safety as averred in the declaration. The approach of the car from the north was plainly visible to the deceased when he was 50 or 60 feet east of the crossing, and if he had looked or exercised any care such as a person would ordinarily exercise who was about to cross railroad tracks where he knew that trains were passing both ways continually, he would have seen the approaching car in ample time to have avoided going upon the track in front of it. It is unreasonable to believe that he looked for the approaching car and did not see it in view of the undisputed evidence as to the character of the headlight which was burning brightly and the manner in which the car itself was lighted, and the conditions surrounding the crossing. While, as urged by defendant in error, there were some trees standing on the north side of Oak street, these trees would not, according to the evidence, materially interfere with his view of the tracks for from 300 to 400 feet north of the point of the accident. That his attention may have been diverted by the car which was leaving the station south of Oak street was no excuse for his failure to observe the car approaching from the north. As the deceased was approaching the Oak street crossing and the point where he was struck, he was partially facing in the direction from which the southbound car was approaching, and the car, therefore, must have been in full view of the deceased if he had looked a little to the right or exercised any care with reference to the approach of the southbound car. He was thoroughly familiar, as the evidence shows, with the situation and the use of the electric tracks

operated by plaintiffs in error, and knew that the trains were constantly passing each way or were liable to be passing each way at any time upon those tracks. The conditions and surroundings of the place where the accident happened make it impossible to believe that the deceased looked or listened for the approaching car or exercised any care whatever for his own safety just before and while he was attempting to cross the tracks.

A railroad crossing at grade over a highway is a place of danger, and the exercise of due care at such a place requires something more from a traveler in the way of care than while he is passing along a street or highway where there is no possibility of being struck by a passing car or locomotive. It is the duty of a person about to cross a railway track at such a place to approach cautiously and to endeavor to ascertain if there is present danger in crossing. Pennsylvania Co. v. Frana, 112 Ill. 398; Chicago, St. Louis & P. R. R. Co. v. Hutchinson, 120 id. 587. It has been repeatedly held by the Supreme Court that a traveler approaching a railroad crossing at grade of the street or highway is required to use such care as a person of ordinary prudence would exercise under the same circumstances, and this ordinarily demands the use of the faculties of sight and hearing to discover whether a train is approaching or not. While it cannot be said as a matter of law that the failure to look and listen under all circumstances will bar a recovery, yet as a question of fact, if there is no evidence that the traveler looked or listened, and if there is no excuse for failing to do so, and no obstructions to prevent seeing the approaching car or train before entering upon the dangerous crossing, it must be held as a question of fact that the traveler did not exercise ordinary care when, if he had looked or listened, he could not have failed to have seen or heard the car. Chicago & Northwestern Railway Co. v. Dunleavy, 129 Ill. 132, 140. If the deceased was not in the exercise of due care and caution, he was, in the

eye of the law, guilty of negligence; and if that negligence contributed to his death, defendant in error cannot recover. Lake Shore & M. S. R. R. Co. v. Hessions, 150 Ill. 548.

In West Chicago St. Ry. Co. v. Manning, 170 Ill. 427, it is said: "What is ordinary care depends upon the circumstances of the particular instance. When the circumstances are such that an ordinarily careful and prudent person would deem it essential to exercise a greater degree of care and caution than upon less threatening circumstances, such greater degree of care would be but ordinary care."

"One must act under all circumstances as a reasonably prudent person would act, which is denominated reasonable or ordinary care." Chicago, Wilmington & Vermillion Coal Co. v. Peterson, 39 Ill. App. 114.

The affirmative allegation of due care and caution not being proved, and willful or wanton negligence not being charged, it is unnecessary to examine the allegations and proof of negligence on the part of plaintiffs in error.

The judgment is reversed.

Reversed.

MR. JUSTICE CLARK DISSENTING;

I am not satisfied that the evidence on the question of contributory negligence manifestly preponderates in favor of the plaintiffs in error. The presumption is that the deceased was in the exercise of due care, and the conclusion of the jury upon the question should in my opinion be determinative.

186 - 18643

ROBERT WHITE, ROY B. TABOR, and J. P. STRICKLAND, co-partners, doing business as WHITE & TABOR,
Appellants,

vs.

ANNIE REZEK and HARRY A. REZEK,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

184 I.A. 12

MR. PRESIDING JUSTICE F. A. SMITH DELIVERED THE OPINION OF THE COURT.

Plaintiffs, appellants, doing business as a copartnership, sued defendants, appellees, for commissions for negotiating a sale of real estate owned by defendants at defendants' request, it being alleged that the plaintiffs procured a purchaser ready, able and willing, but that the defendants refused to sell, and also that the defendants agreed to pay $1125 commissions for the service and later refused so to do. Defendants filed an affidavit of merits denying the averments of the statement of claim and also denying joint liability.

The court at the close of plaintiffs' case instructed the jury to find the issues for the defendants and judgment was rendered upon the verdict returned.

The negotiations between the defendants and Lubowitch, the proposed purchaser whom the plaintiffs claimed to have produced, were conducted by one Hutchinson who was in the employ of plaintiffs. The evidence does not disclose any specific employment of the plaintiffs by defendants, or either of them, in the matter of selling the property. It appears that Hutchinson, at a weekly meeting of the salesmen of plaintiffs, learned that the property in question, at the northeast corner of Armitage and California avenues, was for sale. Thinking that he had a

customer who would be likely to purchase the property, he took one Arado out to look at the property, and for the first time saw the defendants and learned from them the price and terms on which they would make a sale of the property, namely, $46,000, $10,000 of the purchase money to be paid in cash. Afterwards Hutchinson succeeded in interesting one Labowitch in the property, and Labowitch offered $45,000 for the property, $1000 a month for the next succeeding ten months, and $30,000 in five years. This offer was submitted to the defendants subject to the payment by them of a special assessment levied on the property. The defendants rejected the offer but Harry Rezek, one of the defendants, said that he would either take $40,000 and pay the special assessment himself or sell for $45,000, the purchaser to pay the special assessment. This was not agreed to by Labowitch, and after further talk at different times about terms it was ascertained that there were five installments of the special assessment of $190 each, one of which installments had been paid, leaving four installments unpaid. According to Hutchinson's testimony, the purchaser refused to agree to pay $45,000 for the property and pay the unpaid installments of the special assessment, and the defendants refused to sell unless the proposed purchaser would pay off the special assessment. Finally Labowitch stated to Hutchinson that "there is one installment of that special assessment for Armitage avenue for the year 1910 which is now due, and one has already been paid. One is now due for the year 1910. Now, that is while the Rezeks owned the property and I won't pay that. The three which fall due yearly thereafter for three consecutive years, I will pay. If you get that through, I will take it." Hutchinson then went back to the defendants and submitted the offer as made by Labowitch, and the defendants insisted they would not pay any part of the assessment, and, after some discussion as to a mistake in the amount of rents of the property, Hutchinson said to the defendants that he knew that Mr. Tabor, one of the partners, would back

him up in deducting from his commissions the $100 for the installment of the special assessment then due. Hutchinson does not testify that the defendants agreed to do this, but says that thereupon they stated that they would like to get more interest on the mortgage to secure the deferred payments than had been talked about, and on the following day, Hutchinson again saw Miss Reese in regard to the interest, and she said to him that they had talked that over and decided it was probably unfair to ask for more interest in view of what had been said, but she stated that she had seen her brother-in-law with reference to closing the deal and he was opposed to it. She stated that he held a mortgage on the property and she thought he wanted the mortgage paid off, and that in view of the feeling of her brother-in-law, they had concluded that it would make trouble if they sold the property, and they, therefore, would not make a sale without her brother-in-law's consent. Hutchinson suggested that they could get the buyer to assume the mortgage and that the defendants take a second mortgage on the property for the deferred payments. This was not assented to and nothing further was done in the way of negotiations.

The evidence convinces us that the parties never came to an agreement with reference to the sale of the property. The prospective purchaser never accepted the terms of the defendants. There was never any meeting of the minds between the parties to the proposed sale. There was no unconditional acceptance of all the terms of sale before the offer of sale was withdrawn, hence the commissions of the broker sued for never became due. 9 Cyc. of Law and Procedure, 555, also pp. 565, 580 and 581; Corcoran v. White, 117 Ill. 118. In 19 Cyc., page 93, it is said:

> "A broker employed to buy, sell or exchange property, is not ordinarily entitled to compensation for finding or trying to find a customer after the principal has withdrawn his offer, since the principal has a right to revoke his agency at any time before the broker finds a customer able, ready and willing to consummate the transaction on the principal's terms." (Citing cases, including Young v. Trainor, 152 Ill. 438.)

As stated above, the evidence shows no employment of the plaintiffs to sell the property. The transaction, as shown by the evidence, is as consistent with the theory that Hutchinson was acting as agent for the buyer as it is that he was acting as agent for the sellers. At any rate, it is clear from all the evidence that the parties were bargaining upon the understanding that a written and binding contract would have to be drawn up and signed by the parties, stating the terms of the contract in full, before the agent could claim commissions. The evidence shows that when a contract was prepared by Hutchinson, both parties to the contract refused to sign it. Lubovitch refused to sign it without submitting it to his attorney, and testified that he never did submit it to him. The contract was not signed by the defendants. The mere fact that Hutchinson offered to pay the $190, the amount of the installment of the special assessment then due and deduct it from his commissions, did not make a contract between the parties. So far as the evidence shows, neither of the parties to the proposed contract of sale acceded to this proposition. Before a contract could be made, it was necessary for Lubovitch and defendants to come to an agreement with reference to all material elements. Hutchinson could not make an agreement for them by assuming on his own part and without their consent to pay the $190 in dispute.

Assuming the record may show an implied contract of employment, it does not tend to show that plaintiffs procured a purchaser ready and willing to accept the terms offered by defendants.

In our opinion the court did not err in instructing the jury, at the close of plaintiffs' evidence, to find the issues for the defendants. The judgment is affirmed.

AFFIRMED.

MR. JUSTICE CLARK DISSENTING:

I think there was sufficient evidence in support of

plaintiffs' contention to warrant the submission of the case to the jury.

tober Term, 1912. No.

348 - 18915

ROBERT HALPIN,
Appellee,

vs.

THE NATIONAL SAFE DEPOSIT COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

184 I.A. 13

MR. PRESIDING JUSTICE F. A. SMITH DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff below, appellee here, hereinafter called plaintiff, against the defendant below, appellant here, hereinafter called defendant, to recover damages for injuries sustained by plaintiff on February 3, 1909, while he was in the employ of the defendant. At the time of his injury he was attempting to oil the bearings of shafts, a part of an overhead coal conveyor in the basement of a building known as the First National Bank Building in Chicago. The trial before the court and jury resulted in a verdict of $10,000. The trial court overruled defendant's motions for a directed verdict and a new trial, and entered judgment on the verdict.

The case went to the jury on an amended declaration consisting of five counts. Without here stating the averments of the several amended counts, the declaration avers the employment of plaintiff to clean boilers and oil certain machinery on a coal conveyor negligently placed in a dark basement at a great elevation from the floor, close to the ceiling. It is averred that there was only a narrow platform to stand upon when near it, and that the coal conveyor was operated by an electric motor; that there was no means of shutting off the current without descending a ladder and going to another room; that there were a number of

wheels and shafts, and upon one of these shafts there was a safety collar, and that it was necessary for plaintiff to put his body near this safety collar in performing his duties in oiling the machinery; that there was put in this safety collar a set screw, or cap screw, which projected two inches above the collar, and that plaintiff did not know of its existence; that the defendant did know of it and should have notified him; and that by reason of the dust and want of light, he did not see it, and that while in the performance of his duties, under direction of defendant, he was caught by this set screw, his clothes torn from his body and wound around the shafts, and his legs drawn into the meshes of the gearing and cut off.

Briefly stated, the evidence shows that on one occasion, the Saturday before the Monday on which the plaintiff was injured, he was notified of his promotion to the position known as "second utility man," and was taken up the ladder leading to the narrow platform alongside of the wheels and shafts of the machinery which operated the overhead coal conveyor. At that time the machinery was not in motion; and the plaintiff assisted one Quedentsley, his immediate superior, in repairing some of the buckets of the conveyor. He then saw the safety collar on the shaft, but he testified that he never saw the cap screw and that his attenti n was not called to the cap screw or to the fact that it projected beyond the safety collar. When the machinery was in motion, the safety collar made seventy revolutions a minute; the cap screw was of the same color as the collar,- rusty, oily and dirty; the light was bad and the air full of dust when the machinery was in operation. Plaintiff was assigned to the duty of oiling this conveyor on Saturday when it was not in operation, and he was injured the following Monday when it was being operated, and while he was engaged in oiling it the first time.

The evidence tends to show that his clothes were caught by the cap screw while he was engaged in leaning over that

part of the machinery where the safety collar was located, in the discharge of the duty of oiling certain pinions of the machinery, and that in doing so it was necessary to bring his body close to the safety collar in order to reach some of the pinions. The collar and gearing were unprotected and unguarded in any manner, and while holding his clothes close to his body in order to prevent them from coming in contact with the machinery, they were caught by the projecting cap screw and wound around the shaft, and his legs were drawn into the machinery. The evidence shows that he was oiling that part of the machinery in the precise manner as directed and instructed by his superior. There was only one light of eight candle power burning in the room; the bulb was covered with coal dust and the air was full of dust. The evidence shows that the cap screw, projecting from the safety collar, could not be seen when the machinery was in motion.

Voluminous briefs and arguments have been filed by the respective parties, in which many questions and many points of law are discussed. As to many of the points of law argued in appellant's brief, there is no disagreement between the parties and we do not doubt their correctness as questions of law, but we do not deem it necessary to discuss them in detail in this opinion. They relate mainly, so far as they are applicable, to the question of negligence of the defendant and the contributory negligence and assumed risk involved in the record.

The plaintiff was but twenty-one years of age. He entered the employment of defendant to learn to be an engineer. He had worked in a music store and in a real estate office as a boy, and this the defendant knew. He was set to work by the defendant oiling machinery and told that he could not become an engineer until he had learned to clean boilers and do the work in the boiler-room, which included oiling the coal conveyor. He was not employed or paid as a mechanic, or one experienced in the business, but as second utility man. While it may be ordi-

narily considered dangerous for a person to be near rapidly revolving machinery, the character of the machinery and the conditions surrounding the case have to do with the questions of assumed risk and contributory negligence.

A safety collar is so made, and takes its name from the fact, that the head of the set screw is protected. It is within the knowledge of all persons of ordinary intelligence that this collar is attached to the shaft by a set screw and if the collar is a flat one, the head of the set screw is likely to project, while if the collar is protected by flanges projecting from one to three inches up from the collar so as to guard the head of the set screw, thereby making it a safety collar, it is presumed from its construction that no set screw projects above the periphery of the collar; otherwise it ceases to function as a safety collar.

In Columbia Box & Lumber Co. v. Brown, 158 Fed. Rep. 459, decided by the Circuit Court of Appeals of the Ninth Circuit, it was held proper to show by evidence that a safety collar is to protect a set screw from catching in the clothing or catching any part of the person working around it. It is not necessary to hold that employers are bound to use safety collars, but when a safety collar is put upon a shaft, employes have a right to expect it to be just what it appears to be,- a safety collar; and, if the head of the set screw projects above it, it is a defect which an employe may be excused from searching for, and if such a defect exists, an employe who is not familiar with the particular machinery should be warned of its condition in this respect.

It was held in Clark v. C. P. I. & P. R. R. Co., 231 Ill. 548, that "questions of assumed risk and contributory negligence are questions of fact ordinarily. They only become questions of law where, from the facts admitted or conclusively proven, there is no reasonable chance that reasonable minds would reach different conclusions."

The situation of this machinery, its unprotected condition, the light maintained about the machinery, its operation surrounded with coal dust to such an extent that it was difficult to see the machinery in operation, the safety collar, the projecting set screw, together with the age of the plaintiff, his lack of knowledge and want of experience,- are all facts of controlling importance in weighing the questions of assumed risk and contributory negligence. Ames & Frost Co. v. Strachurski, 145 Ill. 192; Kenny v. Marquette Cement Co., 242 id. 396.

As stated in the Kenny case, under the circumstances and conditions surrounding the plaintiff at the time he was injured, we are unable to see how it can be said as a matter of law, or as a matter of fact, that he neglected any duty in failing to see the set screw, or that he assumed the risk of the projecting set screw, or that duty required him to know the condition. The servant assumes the ordinary risks incident to his employment, but the law presupposes that the master has performed the duties of care, caution and vigilance which the law has placed upon him. "The employe does not take the risk of dangers known to the master and unknown to himself and which could not have been known by him by the exercise of reasonable care and which could be avoided by the master in the exercise of reasonable care on his part."

In Cobb Chocolate Company v. Knudson, 207 Ill. 452, the plaintiff was injured by cog wheels in plain view, but he was directed by the foreman to wipe the machinery and he was doing so when injured. A recovery was sustained on the ground that the questions of knowledge of the danger and contributory negligence are questions for the jury, and that when ordering a servant to perform work with which he is not familiar, it is the foreman's duty to take reasonable precautions for the safety of the servant. When Quedenfeley, the vice principal, showed the plaintiff where and how to stand to oil the bearings, he knew that the plaintiff must place his arm and body near the projecting cap screw, but

he did not tell him it was there. As said in Range v. Helsbacher Forge & Rolling Mill Co., 161 Ill. App. 311, in which the plaintiff was caught in a set screw attached to an oldfashioned or ordinary collar: "It was clearly within the province of the jury to say whether appellee was guilty of a lack of care for his own safety in adopting the way he did to oil the shaft in place of one of those suggested by appellant. It was also for the jury to determine whether appellee's clothing was caught on the set screw or at another point on the revolving shaft, as suggested by appellant, and as there is ample evidence tending to show it was caught on the screw, as they must have found, such finding should not be disturbed."

The record shows that the place where plaintiff was working at the time he was injured was an extremely dangerous one and that the foreman, who ordered him to do the work, knew that it was dangerous and knew what the plaintiff did not know,- that the set screw was projecting so far as to increase the dangers of the plaintiff's work, particularly in reaching over the machinery for the purpose of oiling it. It was clearly a question for the jury to determine whether the foreman exercised reasonable and ordinary care to see that the place of work to which he ordered plaintiff was reasonably safe before he put him to work there, and also as to whether the plaintiff knew or should have known the dangers to which he was exposed. Illinois Steel Co. v. Ryska, 200 Ill. 280. It was the defendant's duty to have warned the plaintiff of the projecting set screw in the safety collar. That was a danger among all the dangers of the situation which the plaintiff did not know, and he had a right to rely upon the master's compliance with the duty imposed upon him by law in the absence of notice to the contrary, and he had a right to conclude that the dangers to which he was exposed were only the obvious dangers from the machinery which he knew was there. It was a latent defect which, so far as the record shows, the plaintiff had

no opportunity to discover, and he should, therefore, have been warned of it. Donke Bros. Coal & Coke Co. v. Thil, 228 Ill. 233.

Upon a study of the evidence and the briefs and arguments of counsel we are of the opinion that the material averments of the declaration are sustained by the evidence and proofs, and we find no sound reason in the record for disturbing the verdict of the jury on the merits.

It is, however, urged that the trial court committed reversible error in permitting the plaintiff to introduce testimony tending to prove that there were not any collars in the whole building, where this machinery was located, like the collar in question, except on the coal conveyor, and that it was not necessary that the set screw extend beyond the periphery of the collar in order to firmly attach the collar to the shaft. And it is further urged that the trial court committed reversible error in permitting the plaintiff to prove that the defendant removed the set screw complained of after the accident. These questions are argued in the briefs and were specially dwelt upon in oral argument.

The question put to the witness Quedenfeld as to whether or not there were other safety collars like the one in question in the building, evidently was not to find out if they had projecting set screws in them, or to lay the foundation for the claim that it was negligence to use them, or to compare them with any other kind of collar, but to show what the witness' knowledge was as to the use of safety collars. He answer was, "Why, I have not seen them any place else about there." The answer was harmless in this case, and it was not reversible error to require the witness to answer. It did not affect the question of liability.

The trial court did not commit reversible error in asking the witness Lehn whether or not it was necessary that the

set screw extend beyond the periphery of the safety collar in order to firmly attach the collar to the shaft. In Columbia Box & Lumber Co. v. Brown, supra, evidence was taken as to the office of a safety collar, and the witness testified that the purpose of a safety collar is to protect a person while working near a set screw from coming in contact with it, and that when a set screw is properly adjusted to a safety collar there is no danger in working close to it. In this case a duplicate of the safety collar was offered in evidence and was before the jury. When the jury saw the collar and the screw they could determine as well as anybody whether it was necessary that the screw should project beyond the collar. It was so self-evident that it need not project, that evidence on that subject would not be reversible error, if it was otherwise inadmissible.

If the admission of this testimony was error, it was made harmless by the 25th instruction given at the request of defendant, in which the court said:

> * * * "Defendant, at and before the time of the injury to the plaintiff, had the right to use such devices and equipment on its coal conveyor as it saw fit to use, even though such devices and equipment were in and of themselves dangerous. The mere fact that the machinery at the place where plaintiff was working at the time he was hurt was dangerous does not entitle the plaintiff to recover in this case. The law did not require the defendant to furnish, use and operate a conveyor with any particular make or style of set screw or equipment." * * *

From an examination of the record, it appears that no evidence was introduced or attempted to be introduced tending to show that the defendant remedied or attempted to remedy any supposed defect in the construction of the machine after the injury. Plaintiff brought into court a safety collar and a cap screw which he claimed to be precise duplicates of the safety collar and cap screw that caused the accident. For the purpose of identifying this set screw the witness Smith was permitted to testify that he saw the set screw in the shaft the next morning after the accident before the machine was put in operation, and that he told

an employe, Brooks, to take it out. This was for the purpose of showing that Brooks did take it out as directed, and that he took the set screw to Smith so that he could testify that the one offered in evidence was precisely like the one that was in the collar at the time of the accident. Smith testified, without being asked to do so, that he directed Brooks to take this set screw out and replace it, but the court struck out this evidence and instructed the jury not to consider it, although that in itself would not have been error as it did not tend to show any alteration in the machinery. He might have taken it out to use in evidence, or for some other purpose, and have replaced it with another precisely like it. Brooks said that the same screw was there two weeks after the accident, and that he removed the cap screw; that he had it in his hands after removal, and he identified plaintiff's Exhibit 2 as being a cap screw precisely like the one that was in the collar both before and after the accident, except that the one in the collar was covered with oil, grease and coal dust, and Exhibit 2 was bright and clean.

The witness Smith called for the plaintiff was the defendant's first engineer. When shown the collar produced by plaintiff, he identified it as being a duplicate of the collar that was on the shaft at the time of the injury. As to the cap screw, he testified it projected from two to two and one-half inches above the periphery of the collar, and that he would know a screw like it if he saw it. When the witness was asked if plaintiff's Exhibit 2 was like the set screw in the shaft at the time of the injury, objection was made that it was not shown or claimed that the screw exhibited was the one that was in there the next morning after the accident, or that it was the one that was on the collar at the time of the accident. The witness was then asked to state if he knew what became of the cap screw that he saw there the next morning, and he stated that he directed a man by the name of Brooks to take it out and put in a set screw.

The court allowed that part of the answer which directed someone to remove the screw to stand but struck out the balance. The witness then testified that the screw shown him, plaintiff's Exhibit 2, was just like the one that was in the collar the next morning after the accident. On cross-examination, the witness stated that he told Brooks to get the set screw and he knew that Brooks did get it; that he did not go up with him, but that Brooks brought it to the shop to the witness. The witness said he had no recollection of placing the screw anywhere but that Brooks reported to him that he put it somewhere, and said "I would not be sure that I went up there and seen that he put that cap screw back." The inference from this testimony is that Smith had Brooks take the cap screw out, bring it down and show it to him, and told him to go and put it back.

The witness Cox, another employe of the defendant, saw a set screw in this collar when he was at the machinery for six weeks or two months before the accident. He was asked to describe the set screw and he testified with reference to plaintiff's Exhibit 2, saying that the screw that he saw in the machinery was like that, except that Exhibit 2 was bright and new in appearance; that he made no measurements.

Brooks testified that when he was up where the machinery was, two weeks after the accident, the same set screw was in the machine that was in it before the accident. He further testified that he removed it and had it in his hands, and that it was like plaintiff's Exhibit 2, except that it was bright; that it was a rusty cap screw and had oil, grease and coal dust on it.

On this and other evidence, the collar and cap screw, identified by the witnesses as being exactly like the collar and cap screw in the machine at the time of the accident, were admitted in evidence. It is clear from the record, we think, that the removal of the cap screw was simply for the purpose of enabling the witnesses to testify with reference to Exhibits 1 and

2, as models or duplicates of the collar and cap screw on defendant's coal conveyor at the time of the injury, and that the evidence, when it was introduced, was expressly limited to the purpose of identification, and that it was not offered or received for the purpose of proving that the set screw was removed after the accident for the purpose of being replaced by another screw, or for the purpose of proving that changes and repairs were made after the accident, and the jury were not likely to misunderstand the purpose for which it was introduced. We do not think the admission of the testimony was reversible error. City of Taylorville v. Stafford, 196 Ill. 288; Kath v. East St. Louis & Suburban Ry. Co., 232 Ill. 126.

We do not think that the admission of the model of the collar and projecting cap screw was reversible error. Penn. Coal Co. v. Kelly, 156 Ill. 9; L. E. & W. R. R. Co. v. Wilson, 189 Ill. 89.

In reviewing the whole record we find no reversible error therein. The judgment is affirmed.

AFFIRMED.

Mr. Justice Clark took no part in the consideration of this case.

184 I.A. 15

389 - 18656
390 - 18657

THE ORDER OF COLUMBIAN KNIGHTS,

vs.

ELMER MATZEL et al.,
On Appeal of
AMANDA SCHMIDT,
Appellant,

vs.

ELMER MATZEL,
Appellee,

NEW YORK LIFE INSURANCE COMPANY,

vs.

AMANDA F. SCHMIDT et al.,
On Appeal of
AMANDA SCHMIDT,
Appellant,

vs.

EMMA MATZEL,
Appellee

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE F. A. SMITH DELIVERED THE OPINION OF THE COURT.

The Order of Columbian Knights, a fraternal insurance society, filed its bill of interpleader to determine the conflicting claims of appellant, Amanda Schmidt, and appellee, Elmer Matzel, to the sum of money admitted to be due upon a benefit certificate issued to John Schmidt, husband of Amanda Schmidt. Issues were made up by the answers of appellant and appellee and upon the payment into court by the Order of Columbian Knights of the money in controversy, that Order, or society, was dismissed out of the cause.

Subsequently, the New York Life Insurance Co. filed its bill of interpleader against Amanda Schmidt and Emma Weisel as defendants, and upon an interlocutory decree, the net sum of $883.87, admitted to be due from the New York Life Insurance Co. on its policy, was paid into court, and the defendants therein were ordered to interplead.

By stipulation and orders of court the cases were consolidated for hearing both in the trial court and this court.

It appears from the evidence that shortly after the marriage of John Schmidt and Amanda Schmidt, the appellant in both cases, John Schmidt, at the request of his wife, Amanda Schmidt, became a member of Dewey Lodge, a subordinate branch of the Order of Columbian Knights, and on or about December 28, 1909, the Order issued its benefit certificate insuring the life of said John Schmidt in the sum of $1000, to be payable in the event of his death to his wife, Amanda Schmidt, designated in the certificate as his beneficiary. Prior to the time of making application for said insurance and the issuance of the certificate, John Schmidt, who was at the time without steady employment and possessed no means, or very meagre means, and a precarious income, verbally agreed with his wife, Amanda Schmidt, that he would join the Order and apply for the benefit insurance in her favor with the understanding that out of her separate means and earnings she would pay the expenses of his joining and obtaining the insurance, and would also provide and pay the future dues and assessments of the order to keep the insurance in force and effect, and that the insurance so taken out should be and remain her property.

The evidence shows that Amanda Schmidt had earned and saved through employment as a domestic servant, prior to her marriage, about $600, and, because of her husband's lack of employment, she took domestic service after their marriage and remained almost constantly so employed up to August, 1910, earning

an average of from $45 to $50 a month during the said period.

In accordance with her agreement with her husband Amanda Schmidt gave her husband money to pay for his membership in the Order and for the taking out of the benefit certificate, and from that time until about June, 1910, Amanda Schmidt paid his dues and assessments to the lodge out of her separate funds and earnings. While they resided in the west part of Chicago, near the meeting place of the lodge, she gave her money to John Schmidt from time to time, as he went to the lodge meetings, to pay the dues and assessments. When the Schmidts moved to the south side of the city, she arranged with Schmidt's sister, Emma Matzel, appellee, then living near the lodge, to have her advance or cause to be paid the dues and assessments at their periodical dates, and to reimburse Emma Matzel for such advances at convenient periods, from two to four times each year.

Shortly after September, 1905, said John Schmidt again, at the request of his wife, Amanda Schmidt, signed and delivered to the New York Life Insurance Company an application for $1000 insurance upon his life, and a policy for that sum on his life was issued by the company pursuant thereto, on or about November 3, 1905. This policy was likewise payable, in case of his death, to his wife, Amanda Schmidt, who was named as beneficiary therein. Before taking said policy, John Schmidt verbally agreed with said Amanda Schmidt to apply for the insurance in her favor upon the same understanding as in case of the benefit certificate then outstanding in the Order of Columbian Knights, namely, that said Amanda Schmidt should, out of her own means and earnings, pay the premiums therefor and keep the same in force, and that she should be and remain the beneficiary under the policy as her own property. In pursuance of this agreement, Amanda Schmidt, from her own separate funds and earnings, paid the initial premium on the New York Life Insurance Company policy, and also

all subsequent yearly premiums thereon, excepting the last annual premium due November 3, 1910, and this last premium she attempted to pay in due course at the Chicago office of the company, but there learned, when she went to pay it that the premium had previously been paid by another person, at the time to her unknown.

John Schmidt delivered to Amanda Schmidt, his wife, the original benefit certificate of the Order of Columbian Knights at the time of its issuance in 1899; and the agent of the New York Life Insurance Company delivered the insurance policy to her at the time of its issuance in November, 1905. Both instruments were kept by Amanda Schmidt from the times of their respective deliveries to her in her own separate custody, under lock and key in the drawer of a bureau in her home, her husband not being informed where she kept the key. The certificate and policy so remained in her custody for years until they were abstracted by someone from the locked drawer where they were kept, at some time during a period of about three weeks in August, 1910, while Amanda Schmidt was absent from her home, confined by illness in a hospital. She was not aware of and did not discover the abstraction of these papers from her locked drawer until August 28, 1910, when upon a search for some jewelry, which she kept in the same place, she found that the papers had disappeared, although the drawer remained locked. Amanda Schmidt then talked to her husband in regard to this, but was prevented, upon objection by counsel for appellees, from relating the conversation.

The uncontradicted testimony in the record shows that John Schmidt became addicted to excessive use of intoxicating drink and was an habitual drunkard during the last three years of his life. He was taken to Dwight, Illinois, in March, 1909, to take the "Keeley cure" for drunkenness, but it proved ineffectual except for four or five months after his return to Chicago about April, 1909. He thereafter went on frequent drunken sprees and

was arrested upon divers occasions for disturbing the peace while drunk. While under the influence of liquor, he was dangerous and quarrelsome and acted like an insane person, and did not know what he was doing or the consequences of his acts. On Sunday, September 4, 1910, while in an insane rage caused by excessive intoxicants, and during one of his drunken sprees, he struck, kicked, dragged about, and otherwise maltreated his wife who was sick at the time, called her vile names, threatened to kill her, threw a knife at her, threw her out of her home into the street while she was slightly clad, and Amanda Schmidt was taken away by friends, and on that day they separated. On January 29,1911, her husband, John Schmidt, committed suicide.

Prior to and at the time of her separation from her husband, September 4, 1910, Amanda Schmidt did not know or learn of the whereabouts of her benefit certificate and her policy in the Order of Columbian Knights and the New York Life Insurance Co., nor did she become aware of the alleged change of the beneficiary in the benefit certificate of the Columbian Knights to Schmidt's nephew, Elmer Metzel, appellee, in the Columbian Knights case, nor of the alleged transfer of the insurance policy of the New York Life Insurance Company to said Emma Metzel, who was a sister of John Schmidt, and appellee in the New York Life Insurance Company case, until at the time and place of the holding of the coroner's inquest on the body of John Schmidt, deceased, after January 29, 1911. At that time and place it was stated by one Ferdinand Metzel, husband of Emma Metzel,and father of Elmer Metzel, appellees, that his son and wife had been respectively designated as beneficiaries in lieu of appellant, Amanda Schmidt, in the benefit certificate and in the insurance policy in question.

By reason of the suicide of John Schmidt, which is an admitted fact in the case, and under the by-laws of the Order of Columbian Knights, the insurance claim due under the benefit cer-

tificate of said Order was reduced to the sum of $500. By the interlocutory decree in the Columbian Knights case, the said sum of $500, less $11.50 allowed for solicitor's fees and costs, was paid into court.

The trial court entered a decree in the case filed by the Order of Columbian Knights, finding that Amanda Schmidt, appellant, had no right, title claim or interest in the benefit certificates issued by the order and that there was no binding agreement between Amanda Schmidt and John Schmidt regarding the benefit certificate or the fund payable thereunder, and that appellee, Elmer Matzel, was the sole beneficiary under the benefit certificate, and awarding the fund paid into court to him. The court also entered a decree in the case filed by the New York Life Insurance Company, finding that the beneficiary in the policy was lawfully changed in favor of appellee, Emma Matzel, andtthat appellant, Amanda Schmidt, had no right, title or interest in the policy, or the fund paid into court thereunder, and awarding the fund to Emma Matzel.

It is the settled law of this state that while a certificate like the one in question is not assignable at law, all beneficial interest therein may be transferred in equity, and that equitable rights may be acquired in a benefit certificate which will be enforced in equity. Royal Arcanum v. Tracy, 180 Ill. 183; McGraw v. McGraw, 190 id. 604; Jarvis v. Binkley, 208 id. 541; Black v. Pike, 231 id. 58[illegible]. As held in Hill v. Hill, 130 Ill. App. 278: "Such rights are undoubtedly predicated upon and arise from the fact that such original beneficiary has in good faith and under an express and valid agreement with the member expended money to keep effective that which otherwise would be forfeited and lost to all, and that in such case it would be contrary to equity and good conscience to permit him or her to be deprived of the benefit and advantage of the same as against either

the member who has paid nothing, or one who has voluntarily assumed, during the life of the certificate, to keep the same in force."

A beneficiary acquires a vested right in insurance which equity will protect, if such beneficiary assists in paying the assessments or premiums under an agreement by which the proceeds of the insurance are to be paid to the beneficiary. Swift v. R. P. & T. C. B. Assn., 96 Ill. 305; Pomeroy v. Manhattan Life Ins. Co., 40 id. 398. And where a certificate in a mutual benefit insurance association is taken out for the benefit of the person named therein and delivered to her in consideration of an agreement by the beneficiary which has been fully performed by the beneficiary, the insured cannot destroy the rights of such beneficiary, without her consent, by canceling her designation as beneficiary and procuring a new certificate to be issued to another beneficiary, notwithstanding the by-laws of the association provide that a change of beneficiary may be made at any time, and as often as desired by the assured, without the consent of any existing beneficiary. Such provisions and such rights relate to a case in which the designation has been made voluntarily and gratuitously, but have no application to a case where the beneficiary has acquired rights in and under the certificate for a valuable consideration. Strange v. Knight of Pythias, 189 N. Y. 345.

The principle that vested rights may be acquired in mutual benefit insurance which courts of equity will enforce applies likewise to life insurance policies. Pomeroy v. Manhattan Life Ins. Co., supra; Beach on Life Insurance, Sec. 171.

While appellant was incompetent to testify as a witness to any admissions or conversation of her husband relative to transactions concerning the benefit certificate wherein she was named as beneficiary, she was not incompetent to testify as a

witness to transactions relating to the certificate, such as the delivery to her by her husband of the certificate, the keeping of the certificate by her and where she kept it, and the fact of the payments of dues and assessments thereon by her with her own money, and the disappearance of the certificate while she was absent fro m home in a hospital. This observation applies also to the New York Life Insurance Company policy. Connor v. Connor, 145 Ill. App. 606.

There are two main questions of fact involved in these cases. (1) Was there an agreement between appellant and her husband John Schmidt that if the latter would take out the policies in qestion and make appellant the sole and exclusive beneficiary, appellant would pay all dues and premiums thereon out of her separate funds? and (2) Did appellant thereafter pay or try to pay all dues and premiums on the policies out of her separate funds?

Upon a study of the competent evidence in the record and a due consideration of the arguments, we are of the opinion that the contract set up in the answer of appellant is established by a decisive preponderance of the evidence. We think it is also clear from the evidence that appellant paid or provided for the payment out of her own funds all the dues and assessments of the Order of Columbian Knights. When appellant and her husband transferred their residence from the west side of the city of Chicago to the south side of the city, it became inconvenient for her to visit the Dewey lodge for the purpose of making payments of dues and obligations to the lodge, and she arranged with appellee, Emma Watzel, to advance the money for her and repaid her every two or three or four months and besides paid her for her trouble. This continued until the sickness of appellant in 1910. In May or June, 1910, before her sickness, she requested appellee, Mrs. Watzel, to bring her book in which the payments were entered,

stating that thereafter she intended to go once or twice every year to the lodge and settle, and Mrs. Watzel promised to send the book. When Mrs. Watzel's son, Elmer Watzel, appellee, came to appellant's house two weeks later appellant asked if his mother had sent the book, and Elmer Watzel replied, "No," and gave as an excuse that the family had moved and everything was in confusion, and that they would not be in order until fall and that his mother had said nothing to him about it. After her sickness, appellant repeatedly asked for her book but never received it from Mrs. Watzel.

In this state of affairs and without the knowledge of appellant, the certificate and policy of insurance disappeared during appellant's sickness from the place where appellant kept them; and it appears that a change was made in the beneficiary named in the papers. It is clear from the evidence that appellees knew that the insurance belonged to appellant. It is also clear from the evidence that appellee, Emma Watzel, by repeated solicitations, finally succeeded in procuring from John Schmidt a change in the beneficiary in favor of her son, appellee, in the certificate of the Columbian Knights, and in favor of herself in the New York Life Insurance Company policy; and that the original certificate and original policy were purloined from appellant's drawer for that purpose, and all knowledge of what had been done was kept from appellant until it was developed at the coroner's inquest over the body of her husband.

It follows, we think, that appellees are not in equity with clean hands, for they are partners to a scheme to defraud appellant out of the insurance which she had paid for and protected and kept in force by payments from her own funds with the paltry exception of $4.80 paid by appellee Elmer Watzel to the Columbian Knights, and one payment to the New York Life Insurance Company which appellant tried to pay in due time but

found that some one had paid it before she went to the office for that purpose.

Judging from the pitiful letters which John Schmidt wrote to his wife in his sober moments up to a short time before his death, he was himself not aware that he had made any change in the beneficiary names in the insurance papers.

The release and waiver set up in the answer of Elmer Watzel and offered in evidence, signed by appellant, has no bearing upon the issues in this case and covered no matters here involved. It is wholly immaterial, and should have been excluded.

In our opinion, appellant is entitled to the moneys deposited in court in these cases, and appellees are not entitled thereto. The decrees in each case are reversed and the causes are remanded for further proceedings not inconsistent with the views here expressed.

REVERSED AND REMANDED.

Term, 1911. No.

463 - 18003

184 I.A. 17

WALTER CARLSON, by next friend, Appellee,

vs.

JOHN B. JOHNSON, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action by a minor to recover damages for the loss of sight in one eye caused, as claimed, by a nail or other object falling or thrown on him from the roof of a building while he was on a public sidewalk. All defendants, except appellant, were dismissed out of the case before the trial. As to him the amended declaration alleged in substance that at the time of the accident he was the owner of the building which he was then "by his servants and agents remodeling and repairing, in which operation certain men were engaged in working upon the roof of said building," and that he, by his servants and agents, did so carelessly and negligently proceed with the work on the building that plaintiff was struck by a certain nail or other object which fell or was thrown from the roof of the building, etc. To the amended declaration was filed a plea of general issue.

Some eight months afterward, on the day the case was called for trial, defendant made a motion for leave to file an additional plea, setting up in substance that at the time of the accident the building was in the exclusive possession and control of an independent contractor under a contract with defendant to remodel and repair the same, and that the defendant was not liable for any nail or other object which fell or was thrown from the

roof of said building by said independent contractor. The motion was denied when presented and again on renewal thereof during the trial after a ruling that proof of such matters as were set up in the rejected plea was inadmissible. It is urged that the denial of such motion under the circumstances was erroneous in that it was an abuse of the court's discretion.

The proceedings relating to the presentation of the motion and action of the court are set forth in the bill of exceptions in the following language:

> "And the plaintiff, by his attorneys, Messrs.Goldzier, Rodgers & Froehlich, then and there objected to the filing of said additional plea at such a late date, to-wit: on the day the cause was to be called for trial after having been pending on the daily trial call for nearly two months. Whereupon the court inquired of defendant's counsel whether he considered it necessary to file such plea; whereupon defendant's counsel stated that he did not think it necessary but thought the line of evidence he desired to get in under that plea could be introduced under the plea of general issue; and thereupon the court denied the said motion for leave to file the said additional plea and sustained the said objection to the said motion, to which ruling of the court the said defendant by his attorney then and there duly excepted."

The manifest purpose of the special plea was to meet any objection that might otherwise be made to the introduction of testimony showing that the premises in question were in the exclusive possession and control of an independent contractor, and hence it is contended that when the court asked counsel for appellant whether he considered the plea necessary and denied the motion, it was tantamount to a ruling that it was not necessary and a concurrence in the statement of defendant's counsel "that the line of evidence he desired to get in under that plea could be introduced under the plea of general issue."

If such were the unmistakable import of the record, then, in view of the court's subsequent refusal to receive the testimony when offered, the question of abuse of discretion would be squarely raised. But it is by no means clear that this was the ground of the court's ruling. It does not affirmatively so appear; on the contrary, it may be inferred that the court acted solely upon the ground of the objection that the plea was present-

ed too late where the case had been on the trial call for two months, and in the face of such objection and the absence of any other showing than the nature of the plea, it cannot be said that the court abused its discretion in so ruling. It does not appear that any excuse for not presenting the motion before was offered to the court. As the bill of exceptions is to be esteemed a pleading of the party alleging the exception, if it is liable to the charge of uncertainty or omission, "it ought, like any other pleading, to be construed most strongly against the party who prepared it." (Rogers v. Hall, 3 Scam. 5.)

Looking again to the bill of exceptions for any showing why the court should have granted the motion when again presented, we find no specific reasons were advanced and nothing upon which to rest the contention that counsel was taken by surprise. If he was, the record does not show that he so apprised the court. We do not think, therefore, that it is fairly inferable from the record either that the court's ruling rested solely upon the view that the plea was unnecessary or that counsel had that understanding of it, for it appears that instead of accepting the ruling with such understanding he took exception to it. We cannot say, therefore, that the court abused its discretion.

This brings us to the contention that evidence that the remodeling and repairing of the building were conducted by an independent contractor, was admissible under the plea of general issue. The able and forceful argument in support of this contention reviews several decisions of the Supreme Court applying the doctrine on this question laid down in the case of McMulta v. Lockridge, 137 Ill. 270, and asserts that the interpretation given to it has resulted in an unwarranted departure from the common law rule of pleading in actions on the case in force in this state. It is contended that the ruling in the McMulta case has been misunderstood and that it has been misapplied to actions in case where

the character and capacity in which the defendant was sued were not involved, and to declarations therein where allegations held to be admitted by the plea of general issue did not constitute mere inducement but traversable facts which the plea of not guilty put in issue at common law, and that such ruling is at variance with the previous ruling of the Supreme Court in City of Champaign v. McMurray, 78 Ill. 358, holding that the common law rule as to the plea of general issue is still in force and that the Hilary Term rules, requiring the denial of matters of inducement to be specially pleaded, have not been adopted by our statute, and is inconsistent with the ruling in People v. Kirk, 162 Ill. 152, holding that the common law can be altered, modified or repealed only by an act of the legislature.

We have carefully reviewed the line of decisions following the McNulta case, and are constrained to think that in them consideration was given to the questions of pleadings here raised, and that the rulings were intended to be applicable to cases like the one at bar.

In the case of Chicago Union Traction Co. v. Jerka, 227 Ill. 95, the declaration was that the defendant was in possession of and operated a street-car line and a car thereon which jumped the track and injured Jerka while driving on the street. Allegations as to ownership and operation of the car were referred to in the decision as matters of inducement requiring no proof unless denied by special plea. Among other cases cited therein was Pennsylvania Company v. Chapman, 220 Ill. 428, where the plaintiff, a switchman, was injured in the course of a switching operation, and the averment of the declaration was that the defendant company was operating the road upon which the switching took place. It was there held that the plea of general issue impliedly conceded not only the operation of the road as therein alleged but that the operators in charge of the trains were defendant's servants and employes. Referring

thereto and to other cases, the court in the Jerka case, in summarizing its conclusions, said:

> "Whether the rule above laid down is in strict accord with the principles of common law pleading as they existed prior to the adoption of the rule of the court of the Hilary term, 1834, is a matter of little practical concern, since the rule of stare decisis requires us to enforce the law as we find it, unless considerations of a very controlling character were presented which would justify us in overruling the previous decisions of this court and again laying the foundations of law anew. We see no hardship in requiring a defendant in a case of this character to plead specially that it was not the owner or in possession or operation of the property or instrumentalities which have caused the injury."

Analyzing the decision and looking to these words for the scope of the rule, we are compelled to apply it to the case at bar where the allegation is that the instrumentality causing the injury was an object falling or thrown from a building belonging to defendant in the course of remodeling and repairing thereof by his servants. It will be conceded that the allegation of ownership or possession was material only so far as it tended to show who operated the instrumentality, and, as interpreted in the Jerka case, the plea of general issue in cases of that character admits the operation of the instrumentality if not specially denied. We fail to see any distinction in principle between the infliction of an injury to one on the street through the negligent operation or handling of a street-car, as in the Jerka case, and to one on a sidewalk by the negligent throwing of a nail from a building, or handling of material thereon causing the injury. Surely, the fact that the former involved operation of machinery or a railroad has no vital bearing on the principle. The essential thing deemed to be admitted by the plea of general issue in the authorities referred to is the allegation of control and operation of the instrumentality or agency causing the injury, and until the rule is more clearly defined or limited in its scope by the Supreme Court, we feel constrained to apply it to cases like the one at bar.

It is also urged that the declaration fails to sustain a cause of action. Briefly stated, the contention is that inasmuch as it is alleged therein that the object which caused the injury was thrown from the roof and that "certain men were engaged in working upon the roof," and that the defendant by his servants and agents negligently proceeded with the work on the building from the roof of which the object fell or was thrown, it follows that in the absence of an allegation that the 'certain men' on the roof were defendant's servants, the injury was not connected with or could not have been caused by his servants. It is enough to say that such allegations amounted to nothing more serious than a defective statement of the cause of action that was cured by verdict. (Sargent Co. v. Baublis, 215 Ill. 428; Grace & Hyde Co. v. Sanborn, 225 id. 138.)

It is further contended that the evidence did not establish appellant's liability because it affirmatively appears in the record that there were men working on the building employed by another, and also that he and not defendant had full charge of the work of remodeling the building when plaintiff was injured. As to the latter fact, the objection to the question calling it forth was first overruled and then sustained, but no motion was made to strike out the answer.

Holding as we do, that the court properly ruled that the evidence thus inadvertently left in the record related to facts not at issue but admitted by the pleadings it cannot properly be urged that the jury should have taken such matters into consideration in determining appellant's liability.

We feel it our duty to affirm the judgment.

AFFIRMED.

Cooper Corp., 2nd D. No.

196 - 1954

184 I.A. 19

PAULINE TISCHLER,
Defendant in Error,

vs.

ERIE RAILROAD COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Tischler, the plaintiff below, brought suit against the Erie Railroad Company, to recover for the loss of certain articles alleged to have been accepted and checked by defendant at Ellis Island for shipment therefrom to Rockford, Illinois. The affidavit of merits denied that the goods were lost, that there was a total damage, that they were of the value alleged, and claimed that they did not constitute personal baggage and were not knowingly accepted and checked as such.

The goods enumerated were 35 lbs. pure eiderdown, 1 Russian samovar, 1 brass tray, 1 tea pot, 24 linen towels, 1 quilt, 20 yds. of ticking, and 25 yds. of muslin. The total valuation of the articles was claimed to be $254, and plaintiff, on her direct examination, testified that such was their market value at Ellis Island, at Rockford, and in Russia where she bought them. On cross-examination, however, she admitted that she never bought any articles of the same kind in Rockford or New York, and did not know the market value of them in either place or at Ellis Island. Her testimony was the only evidence on that subject, and was manifestly incompetent. Most of the articles unquestionably had a market value both at the point of shipment and destination, and without testimony thereon the court's finding and judgment

for $325 had no legal basis. On that ground alone we would be compelled to reverse the judgment, and remand the case unless the contention made by plaintiff in error, that such goods did not constitute baggage, is well taken.

It appears that plaintiff was on a return trip from Russia to her home in Rockford, and took a third class passage in the steamship which landed her at Ellis Island. She had a basket trunk and a bundle containing the articles in question, for which she received a check at Ellis Island where she bought a ticket via said road and the Chicago, Milwaukee & St. Paul Railway for Rockford. The check purported to be a baggage check issued by said company, and was treated as such. The basket trunk came through at the same time the plaintiff arrived at Rockford and the bundle some three months later. It can hardly be questioned therefore, in absence of proof to the contrary, that the check came from an authorized agent of the company, and that the goods were received as baggage. The question is,- can the goods, under the circumstances, be so regarded?

The bundle was done up in waterproof sack of heavy goods and tied with heavy ropes, a form in which immigrants and those taking third class passage often carry what is commonly treated as their baggage and what often includes articles for household use. It has been held in at least two cases, Quimit v. Henshaw, 35 Vt. 605, and Parmelee et al. v. Fischer, 22 Ill. 212, that baggage may under some circumstances properly include such articles. But whether it does or not is a question we do not deem necessary to decide, for the general weight of authority sustains the view that a carrier, by accepting articles as baggage which cannot properly be classed as such, is responsible for them as such if he had knowledge of their true character; and also, that although the real character of them is not stated to him when he accepts them for carriage, "if from the facts and

circumstances surrounding their acceptance he ought to know that they are not properly baggage, knowledge on his part of their true character will be presumed and he will be considered as having assumed the liability of a common carrier." (See Hutchinson on Carriers, 3rd Ed., Sec. 1250, and cases there cited.) Under the circumstances as to the character of the bundle and the acceptance thereof as baggage, we are not disposed to disturb the finding of the court that the bundle constituted baggage, or to differ with its holdings of law which so regard it; but, in view of incompetent proof of value, as above stated, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

tober Term, 1912. No.

388 - 18855

184 I.A. 29

MAUDE L. ROBINSON,
Appellee,

vs.

ELSIE WADDELL et al. on appeal
JACOB GLOS,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure. The only question argued in appellant's brief, and hence the only one we are called upon to consider, relates to the admissibility and sufficiency of the evidence relied upon to take the case out of the statute of limitations pleaded in the answer of one of the defendants.

The maker of the note given to secure the trust deed foreclosed was one Wm. G. Waddell, who died in 1897. The note was for $2125, payable June 30, 1898. The bill to foreclose was filed June 29, 1903, one day before the expiration of ten years from the date of an endorsement on the note as follows: "1,000.00 paid by Peabody, Houghteling & Co. on Archt. Ctf. June 30, 1893." Said endorsement was in the handwriting of Joseph W. Helmer, who testified that he personally made it June 30, 1893; that he was then the owner of the note, but sold it in July 1893; and that while from lapse of time he could not recall the precise details of the transaction, he thought the certificate referred to in the endorsement was delivered to him by Waddell, the maker of the note, and that the money so endorsed was procured on such certificate. He further testified that he had no other transaction with Waddell than that represented by said trust deed and note.

It is true that the endorsement not being in the hand-

writing of the debtor, but in that of the then holder, cannot, standing alone, be deemed such evidence of payment as will support the implication of a new promise and thus toll the statute of limitations. (See Wellman v. Miner, 179 Ill. 336, and cases there cited.) But it will be considered in connection with corroborative evidence tending to show actual payment at the time of the endorsement. (Wellman v. Miner, supra.)

If a partial payment was in fact made by Waddell at that time, then, of course, an implied new promise arising therefrom was made within the statutory period, (Lowery v. Gear, 38 id. 385); and, conceding that Helmer was a competent witness, his testimony, unrebutted, was sufficient to establish such payment. The substance and effect of his testimony was that at the time of the endorsement, he as owner of the note received from its maker, who was indebted to him for nothing else, $1000,or a certificate from which he obtained that amount. In the absence of any other occasion for paying him such sum or handing him a certificate therefor, the presumption would be that it was intended to be applied as payment on the note.

The endorsement was also entitled to consideration from the fact that it was made shortly after maturity of the note and nine years before the statute would run, and therefore at a time when there was no motive for a false credit. (Mills v. Davis, 113 N. Y. 243; Coffin v. Buchnam, 18 Me. 471; Roseboom v. Mallington, 17 Johns. (N. Y.) 186; Alston v. State Bank, 8 Ark. 455.)

We think the evidence was sufficient to take the case out of the statute pleaded, and that being the only question argued, the decree will be affirmed.

AFFIRMED.

Clerk, Ill. No.

460 - 18000

184 I.A. 30

E. P. STACY & SONS, a corporation,
Appellee,

vs.

OREGON SHORT LINE R. R. CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment in this case was entered in the sum of $10,080.75 in favor of appellee as plaintiff and against appellant as defendant, upon a claim for damages for alleged negligence in the trans-shipment of a large number of carloads of peaches from Brigham City, Utah, to various points in South Dakota and four other western states, the defendant being the initial carrier. There was a trial before the court and a jury, and the judgment entered corresponds with the verdict.

In the original brief filed by the defendant the points relied upon for reversal are stated to be that the allegations and proof do not support the verdict and judgment, and second, that the charge of the court given orally to the jury is, taken as a whole, misleading, contradictory and conflicting; and objections are made specifically to certain portions of it. In a supplemental brief it is urged, among other things, that the plaintiff should not be allowed to recover because it did not allege in the statement of claim or prove at the trial that it was the lawful holder of the bills of lading.

Many points sought to be raised in the case, and which are discussed in the briefs, it is unnecessary to comment upon because they were not preserved in the record for review. We are un-

able to find in the abstracts of the record that objections were made to any portion of the evidence offered by the plaintiff, and we understood it to be admitted in the oral argument before us that the record does not show any such objections. Nor is there anything before us that raises any question as to the instructions except that an exception was taken to them so far as they related to what constituted a prima facie defense. But the point there raised is not urged in the argument and was abandoned.

As to the point urged specifically in the supplemental brief that the plaintiff did not set out in its statement of claim, or prove upon the trial, that it was the lawful holder and owner of the bills of lading, we are of the opinion that the objection was waived by the defendant. The affidavit of merits first challenges the right of the plaintiff to maintain the suit because of the alleged fact that the plaintiff corporation was organized under the laws of a state other than the State of Illinois, and had not complied with the statute of Illinois regulating the admission of foreign corporations to do business in the state, and alleges that the plaintiff has been and still is doing business in the State of Illinois within the meaning of the statute. This point was abandoned. The affidavit of merits then proceeds to deny the allegations of the statement of claim that the defendant failed and refused to furnish sufficient and adequate equipment or delayed in furnishing the same, and to deny the further fact alleged in the statement that the defendant did not exercise due care in handling the property of the plaintiff, and that there was delay in delivering the same. No motion for a more specific statement of claim was made. The point does not appear to have been raised upon the motion for a new trial, the first attempt to raise it being in this court.

The record shows that bills of lading were introduced in evidence without objection. They show receipt by the defendant from E. E. Merrill of the cars in question, and as consignee the plaintiff corporation. Merrill, who was a witness for the plain-

tiff, testified that the peaches described in the bills of lading belonged to E. P. Stacy & Sons, and were bought by him for that company; that there was no particular reason for having the bills of lading made to him personally, but that it had been customary to do so for years, and that in the present instance the contracts were made and accepted in his name on behalf of and for the benefit of E. P. Stacy & Sons, which corporation was the consignee.

We have had occasion to consider some of the questions raised in the present record in the case of Gamble, Robinson Commission Company v. Union Pacific Railroad Company, 180 Ill.App.256. We held in that case that under the Carmack Amendment to the Interstate Commerce Act, suit must be brought by the legal holder of the bill of lading, or if the bill of lading was not produced its absence accounted for by the plaintiff, who must establish his right to its possession. In the present case we think the record contains within it sufficient evidence to warrant the conclusion that the plaintiff was the legal holder of the bills of lading covering the shipments.

In the consideration of the question as to the proposition advanced by the defendant, that the verdict of the jury is against the manifest weight of the evidence, we are confronted with the fact that the total claim made by the plaintiff, as shown in its amended statement of claim, was for about $3,000 more than the verdict rendered by the jury. The facts respecting the question of negligence in carrying the property are complicated. They have to do with the alleged failure of the defendant to furnish cars promptly, its alleged failure properly to ice the cars, and its alleged failure to transport the freight with reasonable celerity. More than 700 pages of the record are taken up with the oral and documentary evidence submitted at the trial. While in our opinion the verdict of the jury was large, we are unable to say after a careful perusal of the evidence that the verdict was against its manifest weight.

The judgment will be affirmed.

AFFIRMED.

184 I.A. 32

GEORGE JOHN SPOERI, Appellee,

vs.

MODERN BROTHERHOOD OF AMERICA, a corporation, Appellant.

Appeal from Superior Court, Cook County.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the appellee, as plaintiff, against the appellant, as defendant, upon a benefit certificate issued by the defendant to George H. Spoeri, in favor of the plaintiff as beneficiary. The judgment is founded upon a verdict of the jury.

The certificate was issued in March, 1907. In September, 1908, the insured failed to pay assessments for per capita tax and dues amounting to 65 cents, and on October 1st was dropped from membership. On October 8th he was reinstated, and his dues were paid from that time until his death in May, 1910.

In the application for reinstatement the following language is used:

> "I, George H. Spoeri of Chicago State of Ill. wishing to be reinstated as a member of the Modern Brotherhood of America, do declare and warrant on my honor, that I am of sound condition, good health and temperate habits, and that since the date of my application for membership in the said Association I have not sustained any personal injuries nor been afflicted with any disease or sickness whatever, except as follows:
>
> * * * * * *
>
> "This health certificate is given as a part of the consideration of my reinstatement in the Modern Brotherhood of America, and it is agreed that this certificate shall be attached to and be made a part of my original application

for membership in said Association, and that a copy hereof shall be attached to my benefit certificate No. . . . . and made a part thereof.

"It is further expressly agreed and understood that my said reinstatement shall be null and void if the above warranties and representations or any of them shall be untrue.

"Dated this 8th day of Oct., 1908.

GEORGE H. SPOERI."

No disease or sickness was mentioned.

The court instructed the jury that the statements found in this application for reinstatement were representations and not warranties. In answer to special interrogatories submitted at the request of the defendant, the jury found that the insured, George H. Spoeri, was in good health on October 8, 1908, and that he was not afflicted with any illness or disease of the heart during the period of time from the date of his original application for membership in the Modern Brotherhood of America to the 8th day of October, 1908.

It is argued by the defendant that the answers to the special interrogatories were against the manifest weight of the evidence, and indeed were not supported by any evidence. It is further argued that the court erred in instructing the jury in the manner indicated.

For the reasons set out in the case of Continental Life Insurance Co. v. Rogers, 119 Ill. 474, we think that the instruction was proper. The doctrine of that case was reaffirmed in Minnesota Mutual Life Insurance Co. v. Link, 250 Ill. 273, and in Spence v. Central Accident Insurance Co., 236 Ill. 444. The cases of Enright v. Knights of Security, 253 Ill. 460, and Crosse v. Knights of Honor, 254 Ill.80, are cited by the defendant in argument, but we think them clearly distinguishable from those upon which we base our decision.

Holding as we do, that the court was justified in instructing the jury that the statements in the application were not in legal effect warranties, the burden fell upon the defendant to show the fact alleged in its second additional plea - that the

insured knew the statement to be false. We do not find any proof of this sort in the record. The attending physician, who was a witness for the defendant, testified that the insured "did not believe he had heart trouble." In an affidavit which was submitted to the defendant, and made also by the attending physician, the witness heretofore referred to, it is set forth that affiant was "fully satisfied that deceased neither believed nor realized from anything he (affiant) may have told him that there was anything serious the matter with him until long after October, 1908."

We find no error in the record such as should cause a reversal of the judgment, and it is therefore affirmed.

AFFIRMED.

332 - 18799

TILLIE ECKENBERG, Appellee,

vs.

PAUL DUNKLAU, Appellant.

184 I.A. 33

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

A judgment was rendered in this case upon the verdict of the jury in favor of appellee, as plaintiff, and against appellant, as defendant, in the sum of $500 for an alleged assault.

The argument by appellant is chiefly confined to the proposition advanced that the verdict was against the manifest weight of the evidence. The testimony was conflicting, but, as has been often said, the trial court and jury who heard and saw the witnesses were in much better position than are we to determine their truthfulness or the lack of it. By denying the motion for a new trial the trial court has set his approval upon the verdict, and we are unable to say that his conclusion was erroneous.

Complaint is made of an instruction tendered by the plaintiff and given by the court, with reference to the amount of damages to be awarded in the event the jury found the issues for the plaintiff. We find no error in the instruction.

An instruction proffered by the defendant was not given by the court. There was no error committed. So much of the instruction as was proper to be given was covered by other instructions.

The judgment will be affirmed.

AFFIRMED.

er Term, 1912.

339 - 18836

184 I.A. 34

FILIPPO CANGUZZA,
Plaintiff in Error,

vs.

MARSHALL E. SAMPSELL, Sole Surviving Receiver of CHICAGO UNION TRACTION COMPANY,
Defendant in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the plaintiff in error as plaintiff, against the defendant in error as defendant, for the recovery of damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's employes.

The defendant, as receiver, was operating a street railroad on North Halsted street in Chicago, and the accident occurred at or near the intersection of Ohio street. The contention of the plaintiff was that the car stopped and while he was attempting to board it was suddenly started. The position of the defense was that the car did not stop but that plaintiff attempted to board it while in motion. The verdict of the jury was in favor of the defendant, and from a judgment for costs against plaintiff this writ of error has been prosecuted.

Two points are relied on for reversal, which are argued as one in the briefs, namely, that the "court erred in giving and refusing instruction and in allowing improper argument."

The bill of exceptions filed does not purport to give all of the evidence adduced at the trial, or a complete synopsis thereof, in narrative form. It contains the unusual statement

that "the court, on the motion for a new trial, held that while there was some error in the instructions, he was satisfied that the great preponderance of the evidence was with the defendant."

Twenty-nine instructions, sixteen tendered by the plaintiff and thirteen tendered by the defendant, were given. We think on the whole these fully and fairly advised the jury of the points of law which should govern them. An instruction tendered by the plaintiff and refused, as to the effect of the number of witnesses on either side, was fully covered by an instruction given at the request of the defendant. An instruction given as tendered by the defendant, to the effect that if the jury believed that the plaintiff "did not attempt to board said car while it was standing, but that he attempted to board it after it was started and in motion," he could not recover, is said to be erroneous because, it is claimed, there was no testimony whatever on which to base it. The bill of exceptions, as heretofore stated, does not set forth all of the testimony, and for aught that appears in the record there may have been ample evidence before the jury on which to base the instruction.

It is charged that defendant's counsel misread the testimony of one of plaintiff's witnesses by adding the words "at Ohio street" to the answer given by said witness. Counsel for defendant at the trial, denied that he was pretending to read from a stenographic report of the testimony, but on the other hand insisted that he was reading from his own notes, or, as we understand it, from notes made for his use. There is nothing to show that he was reading from a stenographic report of the evidence. It would seem to be a fair inference that Ohio street was referred to in the question, "Did you see it come to a stop there?" to which the witness answered, "It did not come to a stop at all." The jury, however, were instructed that they were not to decide the case upon statements made by counsel which were outside of the evidence, if any such statements had been made.

We find no error in the record in this case which should cause a reversal, and the judgment will therefore be affirmed.

AFFIRMED.

350 - 18817

EDWIN S. POPPER and EMIL L. POPPER, Partners doing business as LEO POPPER & SONS,
Appellees,

vs.

FREDERICK W. SPELZ,
Appellant.

184 I.A. 35

APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought by the appellees as plaintiffs against the appellant as defendant, upon an alleged guaranty of payment of an order made by the Decorative Glass Company, a corporation, which that company had given the plaintiffs. It appears from the record that prior to filing the order plaintiffs wrote from their New York office a letter to "F. W. Spilz, c/o Decorative Glass Wks.," stating that plaintiffs understood that he was willing to guarantee the payment of the order, and plaintiffs enclosed a form which they stated in their letter they would like to have him sign. A Miss Russell, who was a witness for the plaintiffs, testified that she was the secretary of the corporation, the Decorative Glass Company, and was its "bookkeeper and general office girl"; that on the occasion of the receipt of the letter from plaintiffs she had no conversation with Spelz other than "that he refused to sign that guaranty that they sent. * * * With reference to this letter Mr. Spelz said that if the other O. K. was not sufficient, the order could be canceled. I was to reply and tell them that if the O. K. was not sufficient, why, they could cancel the order." She further testified that she wrote the following letter:

"In reply to your letter of Sept. 16th, I wish to

say that I oked the order which your Mr. Baugher sent in to you and if that is not sufficient guarantee I will have to ask you to cancel the order as we can get this glass from other places.

Yours truly,

F. W. SPELZ,
per M. Russell."

The witness further testified that she had no conversation with Mr. Spelz following the mailing of the letter, with respect to it, until after he received an acknowledgment of same; that he then told her he was sorry that she used the word "guarantee."

It seems that the plaintiffs wrote to the defendant on September 20th, one day before the goods were said to have been received in Chicago, to the effect that the letter referred to would answer as a guaranty and that the goods would be shipped accordingly.

The witness, Miss Russell, further testified that defendant afterward stated that he would like to have this bill paid, as "they were pushing him for payment."

It seems that Spelz was treasurer of the Decorative Glass Works at the time the order was given. The defendant himself testified that Miss Russell handed him the order and simply said that Baugher, who was the agent for plaintiffs, would not deliver the goods unless the order was "O. K.'d"; that Baugher wanted an O. K. on the order to know that it was really given by the Decorative Glass Company. He further testified that the instruction to Miss Russell was given by one Gaytes, who was connected with the Decorative Company, and that the latter told her to reply saying that defendant would not guarantee the account; that the first he knew of the letter heretofore referred to, and signed with his name, "per M. Russell," was four days or more after it had been written, when Miss Russell produced a copy of it at his request, and that he told her she had no authority to write a personal letter that was not given to her by him.

The theory upon which recovery was had in the trial court was that by putting the letters "O. K." upon the order, the defendant guaranteed payment of it by the Decorative Glass Company, and that the Glass Company not having paid the account, liability therefor rested upon the defendant.

The letters "O. K." do not of themselves constitute a contract of guaranty. From them alone the character of the transaction cannot be determined. They would be understood generally as meaning that the order had the approval of the officer whose name appears, but they cannot be taken to mean that such officer would pay the account if the corporation principal did not. It is a well established principle that the liability of a guarantor is limited to the express terms of his undertaking and cannot be extended by implication. Gilbert v. Yunk, 214 Ill. 237; Salomon v. McRae, 47 Pac. Rep. 409; Moore v. Fleaman, 50 Atl. Rep. 882. The defendant had signified his unwillingness to guarantee the account by refusing to sign the form of guaranty sent by plaintiffs.

In our opinion the plaintiffs did not establish a guaranty of the account by defendant, and the motion made to direct a verdict in favor of the defendant should have been given.

Other errors are alleged in the rulings of the court in the reception of evidence, and in the alleged improper conduct of plaintiffs' attorney in his argument to the jury, but these we need not consider.

The judgment will be reversed.

REVERSED.

EDWARD J. WELCH,
Appellee,

vs.

HELEN M. NEWBOLD,
Appellant.

184 I.A. 36

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Recovery was had in this case by the appellee as plaintiff against appellant as defendant, upon an account stated. The plaintiff, who was a lawyer in New York City, acted as attorney and business agent for the defendant for several years upon a written contract. The account is made up of items of disbursements by the plaintiff made on account of the defendant, and includes charges for his professional services based upon a monthly compensation fixed by written contract. There was a trial before the court and a jury, and from a judgment entered for the amount of the verdict this appeal has been prosecuted.

The points relied upon for reversal are the alleged error of the court in overruling defendant's motion for a more specific statement of claim; second, that there were errors in the reception and rejection of evidence; third, that the court erred in refusing to give certain instructions to the jury as requested by the defendant; fourth, that the verdict is clearly contrary to the law and the weight of the evidence; and fifth, that the court erred in denying the motion made by the defendant for a peremptory instruction to find the issues in favor of the defendant.

The larger part of the briefs of both parties is devoted to a discussion of the fourth point urged, namely, that the verdict is contrary to the weight of the evidence. After careful

examination of the record and of the arguments of counsel based thereon, we have reached the conclusion that the point is not well taken.

The second point discussed in appellant's brief is as to the alleged error of the court in overruling the motion of defendant for a more specific statement of claim. The abstract discloses that interrogatories, as permitted under the practice of the Municipal Court, were filed by the defendant, and answers thereto also filed. These, however, are not abstracted. How far the answers to these interrogatories may have influenced the trial judge in his decision on the motion for a more specific statement of claim, we are unable to say. We are, however, of the opinion, after examination of the record, that the discretion vested in the trial judge as to requiring an additional or more specific statement of claim was not abused.

It is next urged that certain correspondence between the parties was improperly admitted in evidence. It had to do with plaintiff's written requests for money, and replies thereto expressing regret that defendant was unable to send the money at that time but would do so thereafter, etc. It is said that the letters from the plaintiff were self-serving declarations. We do not so regard them. They were in the nature of demands for payment, and the answers to them constituted admissions on the part of the defendant, of which it was proper the jury and court should be advised.

It is next urged that the plea of the statute of limitations set out in the affidavit of merits is, under the evidence, a bar to the action. The plaintiff testified that on December 2, 1910, he called upon the defendant at her home in Chicago and presented his statement of account and asked for payment, that the defendant then said that she believed she could pay him at least part of the account in April, and that she would pay the balance monthly until the whole account was settled. This testimony was corroborated in substance by another witness who

went with the plaintiff, and although the testimony was denied by the defendant, the issue upon the question was by the verdict found in favor of the plaintiff. We think there was sufficient proof of the admission of the debt and the promise to pay the same, and that the statute of limitations does not apply. Walker v. Freeman, 209 Ill. 17.

Two instructions were tendered by the defendant and marked "refused" by the court. The court announced that he would charge the jury orally. It might be conjectured from the record that the oral charge consisted of giving sundry requests submitted by the parties to the case. If we treat the charge as oral, under the rule laid down in Morton v. Fusey, 237 Ill. 28, they were properly refused. However, we have carefully examined the two instructions, and are of the opinion that in so far as they were proper they were covered by other portions of the charge.

The judgment will be affirmed.

AFFIRMED.

Office Form, 1910.
358 - 18935

184 I.A. 37

FRANK L. TUTTLE,
Appellee,

vs.

HELEN W. NEWBOLD,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in this case in favor of the appellee as plaintiff, and against the appellant as defendant, upon the assignment of the claim of one Welch of an account for services and disbursements alleged to have been performed and made by the said Welch.

The grounds alleged for reversal are that the verdict was contrary to the law and the evidence, and that there was error in the admission in evidence of certain letters.

We have carefully considered the record, and are of the opinion that the verdict is at least not so manifestly against the weight of the evidence as should cause a reversal.

The letters offered in evidence were similar to those passed upon in the case of Welch v. Newbold, No. 18813, an opinion in which case is filed this day. For the reasons stated in that opinion, there was no error in the reception of these letters.

The judgment will be affirmed.

AFFIRMED.

391 - 18858

184 I.A. 40

In re Estate of OSCAR SCHROEDER, deceased, on Appeal of CATHERINE L. FOX et al.,

Appellants,

vs.

HENRY EHLERS et al., executors, etc., of the will of OSCAR SCHROEDER, deceased,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

On August 11, 1911, an order was entered in this case in the Probate Court, approving the executors' final account and ordering their discharge upon the filing of receipts of distributees. The order in terms further allowed Catherine Fox and Sophia Lord, as residuary legatees, an appeal to the Circuit Court upon "their joint bond of $200 within twenty days." On August 30, 1911, in pursuance of a notice given the attorney for the executors of a motion to extend the time for filing an appeal bond, the parties met in the Probate Court, and on that day an order was entered setting aside the order of August 11th, heretofore referred to, approving the final account of the executors, discharging them upon filing receipts, etc. The order omits certain recitals contained in that of August 11th, and in terms allowed to appellants, as residuary legatees, an appeal to the Circuit Court, certain alleged objections being set forth in the order. Within twenty days after August 30, 1911, the appeal was perfected by the filing of a bond theretofore approved in open court. The Circuit Court upon motion of appellees dismissed the

appeal upon the one ground that the Circuit Court was without jurisdiction.

It is argued by the appellees that this action was proper for the reason, as alleged, that the order of August 11th was a final one, and that as the order of August 30th approved the same final report, the last named order was void as an attempt by the Probate Court to do by indirection what it had not the power to do directly, namely, to extend the time for the approval and filing of an appeal bond. It is admitted that the Probate Court had the power during the term within its discretion to set aside the order first referred to and enter the second, but it is argued that there was an abuse of the discretion so vested. For this reason it is said that the order of August 30th is void, and that the order of August 11th stands as the final order and must be considered as the one from which the appeal was attempted to be taken.

It should be noted that the appeal bond refers to the order of August 30th, and no appeal from the order of August 11th was attempted. The Probate Court had jurisdiction, and the order, if it was erroneous, was not void. As stated in 15 Ency. of Pleading & Practice 281, to which we are referred by the appellees, if it clearly appears that there was an abuse of discretion by the Probate Court, "its action may be reviewed on appeal." It is clear that an erroneous order entered in the Probate Court can not oust the Circuit Court of jurisdiction where an appeal is taken in apt time. In order to make the review permitted by the practice, the Circuit Court in this case must take jurisdiction, and we are of the opinion that jurisdiction was obtained in the manner provided by the statute.

The second order was in several particulars different from the first, and it may well be that the Probate Court in the exercise of its discretion deemed it just to the parties that the first order should be set aside and the new order with the ad-

ditional matter in it spread of record. We are unable to say, therefore, from the record before us that abuse of discretion by the Probate Court was clearly shown.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

383 - 16859

184 I.A. 42

BESSIE APTHORP,
Appellee,

vs.

PAUL O. DOWNE,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The judgment appealed from in this case, based upon the verdict of a jury, was rendered in a suit brought by the appellee as plaintiff against the appellant as defendant, on account of personal injuries sustained by the former through the alleged negligence of the defendant.

The points relied upon for reversal are, alleged errors in the reception of evidence, and the failure to give certain instructions tendered by the defendant.

The only evidence claimed to have been improperly received is that of an alleged bill of sale of the horse and wagon to the defendant, offered apparently upon the assumption that it was necessary for the plaintiff to prove ownership. The only plea was that of the general issue, and under repeated decisions that did not place the burden of proof upon the plaintiff. On the other hand, ownership was admitted by the plea. Pennsylvania Co. v. Chapman, 230 Ill. 428; Chicago Union Traction Co. v. Jerka, 227 Ill. 95. This disposes also of the alleged error in refusing to give three instructions. The abstract does not contain any of the given instructions. We have, however, gone to the record, and are of opinion that in so far as other tendered instructions were

proper they were covered by those which were given.

The judgment will be affirmed.

AFFIRMED.

18452

Feby 4 14

Mr. Lane:

Decision in this case was
filed by D. Court on
DEC. 4-13 (nunc pro tunc as of Dec 2d)
and was affirmed on Rehearing.
On. Dec. 24-13 Rehearing was denied
copy of rehearing petition is herewith
enclosed. & will you please note
rehearing denied on opinion the
we sent you on December 26-
Clerk Appellate Court.

184 I.A. 48

406 - 18462.

CAROLINE E. KNIPPING,
Appellee,

vs.

CHICAGO TELEPHONE COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

184 I.A. 48

This is an appeal from a judgment obtained by Caroline E. Knipping, hereinafter called plaintiff, against the Chicago Telephone Company, hereinafter called defendant, for damages on account of personal injuries.

Plaintiff claimed to have been injured by using one of defendant's telephones. She says that while answering a telephone call she "got a pain right through the ear"; that she could hardly hear for an hour thereafter, and suffered pains in the ear. This condition continued for a week, when she was examined by a doctor, who found a large abscess on the side of her neck, which he lanced three times. She remained in bed for about a month and suffered much pain.

Defendant's counsel have argued with force that the verdict and judgment are not supported by the evidence. We might be persuaded to agree with counsel if it were not for the condition of the record before us, which, in our opinion, makes it impossible to consider the points urged upon us.

Upon the trial counsel for defendant asked the court to give to the jury a special interrogatory, which was done, with an unimportant modification made by the court. This interrogatory is as follows: "Did the plaintiff receive an electric shock while using the telephone in question?" To this interrogatory the jury

returned the answer, "Yes." Also at the request of the defendant the court gave to the jury the following special interrogatory: "Was the abscess of which the plaintiff complains a result of an electrical shock received while using the telephone instrument in question?" and to this special interrogatory the jury returned the answer, "Yes."

Defendant filed a motion for a new trial, with written reasons therefor. It did not, however, in this motion, or in the written reasons, or in any way whatever, move or request that the special findings or either of them be set aside, and there is no assignment of error in that regard. In this state of the record the defendant is conclusively bound by these findings. (City of Aurora v. Rockabrand, 149 Ill. 399; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9; Empire Laundry Machinery Co. v. Brady, 164 Ill. 58; Voigt v. Anglo-American Provision Co., 104 Ill. App. 425; Pittsburgh, C.C. & St. L. R. Co. v. Bovard, 121 Ill. App. 49; Tate v. Missouri Pac. Ry. Co., 157 Ill. App. 105; Farrell v. Illinois Tunnell Co., 177 Ill. App. 425.) The finding of the jury that plaintiff received an electrical shock while using defendant's telephone instrument, which resulted in the injuries complained of, is binding upon the defendant. Therefore there is presented nothing for the consideration of this court which might require a reversal. The defects claimed to be in the declaration are cured by the verdict, and there was no error in the trial court refusing the instructions which were refused.

After the filing of the foregoing opinion, the defendant filed a petition for a rehearing, presenting the point that admitting the rule to be as stated above, yet where there is no evidence whatever in the record tending to support plaintiff's declaration, the trial court commits an error of law in denying the motion to instruct the jury to find the defendant not guilty, and that by

duly excepting to this ruling of the court the right to have the ruling reviewed on appeal is preserved without the necessity of any further motion, not even the motion for a new trial. There can be no doubt that this is the correct rule of practice. Pate v. Blair-Big Muddy Coal Co., 252 Ill. 198.

A rehearing was allowed and additional briefs were filed by both sides, with special reference as to whether there was any legal evidence tending to prove the allegations of plaintiff's declaration, which warranted the court in denying the motion for an instructed verdict and in permitting the jury to pass upon the issue as a question of fact.

Plaintiff by her declaration alleged in substance careless and improper management, operation, maintenance and control of the telephone system, consisting of instruments, wires, plant and all the appurtenances thereto in the village of Oak Park; that by reason thereof, while she was using the telephone, it transmitted a shock into her head, arms and body, with resulting injuries. There is abundance of evidence uncontradicted that when she used the telephone on the occasion in question she received a shock, indicated by her own statement that a cracking noise came from the receiver into her ear, that she immediately got an intense pain "right through the ear," and could hardly hear for an hour. Other witnesses who observed her at the time said that she turned white, uttered a shriek, dropped the receiver and threw her hand to her ear, saying that the receiver had hurt her ear, and that she appeared to be in pain.

In addition to this there was testimony tending to prove that at a point about twenty feet from the building in which was the telephone instrument in question, the telephone wire connected with the instrument was about six inches from an electric light wire; that the wires came in contact with each

other when the wind blew, and that sometimes boys would throw hoops against them to make them strike together; that the wires were sagging.

There was also the testimony of an expert to the effect that it was possible for the voltage of an electric light wire by contact to be transferred to a telephone wire and, coming into an instrument over the telephone wire, to give a severe shock to anyone using it at the time; that the ordinary current used in operating telephone wires of the Chicago Telephone Company was between 30 and 40 volts, and that the current of an electric light wire was about 220 volts.

The correct rule applicable to a motion to direct a verdict is, that admitting the evidence in favor of the plaintiff to be true, does it, together with all legitimate conclusions which may be drawn therefrom, fairly tend to establish the plaintiff's cause of action as laid in her declaration? If it does, then the court commits no error in refusing the motion and in permitting the facts to be passed upon by the jury. It is not for the court to consider whether the evidence is weak or strong, or whether or not discredit has been cast upon it by cross-examination. All such matters are for the jury to weigh and pass upon. Libby, McNeill & Libby v. Banks, 209 Ill. 109; Metropolitan West Side Elevated Ry. v. Fortin, 203 Ill. 454.

We are of the opinion that the evidence above referred to fairly comes within the rule announced, and that the court committed no error in refusing the peremptory instruction. In so holding, we are not looking solely to the evidence tending to show only that plaintiff received a shock. What we should decide where this was the only evidence adduced by the plaintiff, we are not now prepared to state. We are moved to our conclusion, however, by a consideration of the testimony concerning the contact of the sagging tele-

phone and electric light wires, and the result therefrom to any one using the telephone instrument. This consideration makes inapplicable the theory of defendant's counsel that its defense is not a defense which contradicts but "one which confesses and avoids the evidence on behalf of the complainant." We do not understand that defendant confesses the contact of these two wires, but that it rather seeks to contradict by its evidence this vital point. It therefore follows that Wallner v. Chicago Consolidated TractionCo., 245 Ill. 152 is not in point, which case might properly be characterized as one in which thedefense was not of contradiction but of confession and avoidance.

This evidence concerning the contact of the two wires also, in our opinion, takes this case out of the res ipsa loquitur class. Evidence that the wires had been in the condition described for two years or more before the accident, directly tends to prove negligence.

The claim that there is no evidence whatever that the shock received by plaintiff caused the injuries complained of, is answered by the application of the rule stated in Chicago Union Traction Co. v. May, 221 Ill. 530, and Greinke v. Chicago City Ry. Co., 234 Ill. 564, which is that evidence of a condition of good health prior to an accident, and illness and poor health immediately succeeding it, is sufficient evidence from which the jury might legitimately conclude that the latter condition was caused by the accident.

For the reasons given above and in our previous opinion, the judgment will be affirmed.

AFFIRMED.

October Term, 1912. No.

109 - 18557

W. W. WILCOX COMPANY,
Defendant in Error,

vs.

J. E. INGRAM,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

184 I.A. 49

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Counsel for the defendant in error herein has moved this court to strike from the record the stenographic report or statement of facts herein, and urges a number of points in support of this motion. We shall consider only one of them.

A final judgment was entered on April 6, 1912, and under the statute the stenographic report should have been filed within thirty days thereafter, or within such extended time as the court might within thirty days allow. Within thirty days a sixty day extension of time was duly granted, which expired July 5, 1912. Upon referring to the stenographic report we find that the trial judge certified that it was presented to him in open court to be signed and placed on file on June 28, 1912, and on the same day the trial judge signed the necessary certificate to the effect that it was a correct stenographic report of the proceedings at the trial. Thereafter, on February 3, 1913, an order was entered that the "bill of exceptions be filed nunc pro tunc as of June 28, 1912." Afterwards, on February 5, 1913, an order was entered by one of the judges of the Municipal Court vacating and setting aside the order allowing defendant to file "bill of exceptions nunc pro tunc as of June 28, 1912." Afterwards, on February 7, 1913, an order was entered by one of the judges of the Municipal Court, who was not the judge before whom the trial of the cause was had, ordering that the stenographic report be filed nunc pro tunc as of June

22, 1913, and the file mark on the stenographic report is, "Filed nunc pro tunc as of June 22, 1913, Feb. 7, 1913, the Municipal Court of Chicago, Frank P. Danisch, Clerk."

We must take the record herein as a true recitation of the facts, and from this it appears that the stenographic report was presented to the trial judge on June 22, 1913, and signed by him on the same day. This date was within the limitation of the time of the order extending the time. We must therefore assume that after the signing the stenographic report was delivered to the attorney, and that it was not through any fault of the judge but solely through that of the attorney that it was not filed until nearly eight months thereafter.

This situation falls squarely within the reasoning and conclusion of this court as announced in its opinion in Chicago & Riverdale Lumber Co. v. Garside et al., 179 Ill. App. 40, where the practice with reference to facts similar to those now before us was discussed at length. In that case the statement of facts was signed on January 8, 1913. The time for filing expired January 10th, but it was not filed until March 28, 1913; and we there said: "The certificate of the judge shows that it was in fact signed on January 8th; and therefore, if the trial judge had entered an order on March 28, 1913, permitting the certificate to be filed nunc pro tunc as of January 8th, such an order would be void and of no effect because entered at a time when the court had lost all jurisdiction and control of the matter." For a full statement of our reasons for this conclusion we refer to the opinion in that case.

Holding as we do, that our conclusion in the case cited was correct, and as it fits squarely the facts before us, the motion to strike the stenographic report from the record will be allowed. We might also add that what is said in the Garside case concerning the effect of affidavits upon the statements appearing in the record is applicable to the situation now under consideration.

In the absence of any stenographic report, we find no errors in the common law record, and the judgment will therefore be affirmed.

AFFIRMED.

Term, 1913. No.

20 - 18235.

OTTO GEIERSBACH,
Defendant in Error,

vs.

JOHN A. FIPPINGER, president, PHILIP H. KORRELL, clerk, JULIUS E. ABEL, CHARLES RICHTER, MARTIN J. FRASE, JOHN GLOS, Jr., CHARLES HAANKE, and HENRY SCHWERIN, as members of the Board of Trustees of the Village of Bellwood, Illinois, and as members of the Board of Local Improvements of said Village,
Plaintiffs in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

1841.A.58

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 20, 1911, Otto Geiersbach filed his petition praying that a writ of mandamus issue against plaintiffs in error, respondents below, to which petition a demurrer was subsequently sustained. On March 18th, Geiersbach filed an amended petition praying that the writ be directed to said respondents "commanding them and each of them to take the necessary steps to put into collection the said assessment, known as Bellwood Special, No. 3, and to issue to petitioner the proper vouchers for work and labor done and material used to the amount of $1540.46, and for such further order as may be made in the premises." To this amended petition a general and special demurrer was filed, which was overruled, and on July 12, 1911, the respondents electing to stand by their demurrer, the court adjudged "that a writ of mandamus do issue herein, and that the petitioner do have and recover of and from the respondents his costs and charges in this behalf expended", to the entry of which judgment the respondents excepted. On September 20th, a motion to vacate the judgment was denied, and on October 3rd the writ of mandamus was issued and subsequently served. The writ commanded that the respondents, and each of them, "as members of the Board of Trustees of the

Village of Bellwood and as members of the Board of Local Improvements" of said village, do issue without delay to said Geiersbach "vouchers and certificates for work and labor done and materials used to the amount of $1,546.63", and "take the necessary steps to put into immediate collection the special assessment known as Bellwood Special No. 3, as requested by the said Otto Geiersbach." The respondents seek by this writ of error to reverse the judgment.

The amended petition alleged in substance that said village was a municipal corporation and had been for more than three years last past; that the board of trustees consisted of said Pippinger, president, said Morrell, clerk, and the other respondents named as members thereof; that said respondents, excepting Henry Schwerin, were the members of the board of local improvements of said village; that on November 18, 1908, the president and board of trustees of said village passed an ordinance for the construction of a cement sidewalk on Twenty-fifth avenue and certain other streets, and that said ordinance was duly published according to the statute. A copy of the ordinance, together with a copy of the recommendations of said board of local improvements, and an estimate by the engineer of said board of the probable cost of the improvement, as afterwards approved by both boards, were attached to the petition and made a part thereof. It was provided in the ordinance that the special assessment should be payable and should be collected in one payment. The petition further alleges in substance that the village, by its attorney, filed a petition in the County court of Cook county, February 9, 1909, praying that steps be taken to levy a special assessment for said improvement, which petition was known as Bellwood Special No. 3; that on April 5th the assessment roll, duly made and certified, was filed, and that on May 7th, no objections having been

filed, the assessment was duly confirmed by the court; that on August 2nd, the secretary of said board of local improvements was directed to advertise for bids on all unfinished sidewalks provided for in said special assessment, said bids to be opened at 8 o'clock on the evening of August 18th, that a copy of the notice attached to the petition is made a part thereof, and that such notice was duly published and posted in accordance with the statute; that petitioner submitted a sealed bid for the laying of said sidewalks and that on said evening at a meeting of said board of local improvements the bids were opened and that there were but two bids, one of which was that of petitioner which was at the rate of 10 1/2 cents per square foot; that petitioner's bid was the lowest and that, by unanimous vote of said board, his said bid "was accepted and the contract therefor awarded to your petitioner, providing that he furnish a certified check to be approved by the president of said board", and he was "then and there notified of the acceptance of his bid by said board"; that he requested said board to draft and furnish him with a proper contract and stated that he would in all terms comply therewith and furnish the requisite security; that he endeavored to secure a written contract from said board and the attorney thereof, who informed him "that the entering into a written contract and bond between said village and your petitioner was entirely unnecessary, and that he could after notice proceed with the fulfillment of the work"; that he advised other members of said board of their failure to provide a written contract and that they each informed him that it would be unnecessary for him to enter into such contract in writing or to furnish such security, but that he would be paid without such conditions for all work done on said walks and for material furnished by him; and that "the notice of the awarding of such contract to petitioner by said board was duly published

and posted by said board according to the statute." This last allegation discloses that the one cause for special demurrer stated in respondent's demurrer to said petition, viz: "that petitioner has not alleged . . that notice of the awarding of the contract was posted and published according to law", is without foundation. The petition further alleged that more of the property owners with a frontage on said streets elected to take said work themselves within 10 days or to commence same within 30 days after said publication of said award to petitioner; that after the acceptance of his bid the said president of the board of trustees and the members thereof requested petitioner to commence work on the various sidewalks, and petitioner was again advised by them that it was unnecessary for him to obtain a written contract, that "they would waive said contract and bond", that he should proceed at once with the work, and that under said instructions and orders, and in accordance with the terms of said ordinance, he proceeded to lay said sidewalks under the direction of said village board, the board of local improvements, and one Charles Dressander, president of both boards, and one O. A. Bolter who had been authorized to superintend and inspect the construction and the doing of said work; that petitioner "furnished the materials, complied fully with the terms of the ordinance, completed the said work constructed (contracted) for by him, and the same was duly accepted by the said superintendent, the president of said board and the village of Bellwood and by its boards and each of them"; that on or about November 1, 1920, petitioner personally appeared before said boards and demanded a certificate, showing the work done by him and the amount due him, but that the said board of local improvements and the said president and board of trustees refused, and still do refuse, to issue any certificate to petitioner, "or to take the necessary steps to put into collection the said special assessment",

for the purpose of paying petitioner for the work and labor done and the materials furnished by petitioner for said improvements, in accordance with the statute made and provided, by means whereof petitioner is prevented from receiving the warrants and vouchers due him for said labor and materials, to which he is lawfully entitled. The petition was verified. It is to be noticed that petitioner does not in said petition state any definite amount which he claims to be due him for said work and materials.

The writ of mandamus may be resorted to to compel a village to proceed to enforce the collection of a special assessment if it has failed to discharge its duty in that respect. (Sec. 73 Local Improvement Act; Shannon v. Village of Hinsdale, 190 Ill. 203, 208; People v. City of Pontiac, 196 Ill. 437; City of Alton v. Foster, 207 Ill. 150; Conway v. City of Chicago, 237 Ill. 128, 135; Price v. City of Elgin, 257 Ill. 83, 87). By their demurrer the respondents admitted such facts stated in the petition as were well pleaded, and we are of the opinion that the allegations of the petition sufficiently show, at least as against a general demurrer, such a state of facts as entitles petitioner to a writ of mandamus commanding respondents to take the necessary steps to put into collection the said special assessment.

It is contended by counsel for respondents that, because the petition shows that the bid of petitioner was not accompanied by cash or a certified check in accordance with the statute and because the petition shows that petitioner never obtained a formal written contract, the petitioner is not entitled to any of the relief prayed. We cannot agree with counsel. It appears that the sealed bid of petitioner, unaccompanied by cash or a certified check, was accepted by the village, that petitioner was told that the signing of a formal written contract was unnecessary, and that the notice of the awarding of the contract to petitioner was duly

published and posted. The acceptance of petitioner's written bid as made constituted a contract between the parties, (Park Commissioners v. Carmody, 130 Ill. App. 636, 640,) which the municipality had the power to make. The fact that certain required formalities were not complied with should not militate against the petitioner, especially where it further appears that both parties acted on the assumption that a valid contract had been entered into, and the village received the benefits of the contract. Petitioner, in accordance with the ordinance, proceeded to lay and did lay the sidewalks under the superintendence of agents for the village, completed the work contracted for, and the work was accepted by the village. We think that respondents are estopped from setting up the irregular manner in which the contract was entered into, as a defense to the issuance of a writ of mandamus commanding them to take the necessary steps to put into collection the said special assessment. (Drainage Commissioners v. Lewis, 101 Ill. App. 150, 153; County of Coles v. Goehring, 209 Ill. 142, 148; City of Chicago v. Pittsburg, etc. Ry. Co., 244 Ill. 220, 232).

The judgment of the court in this case was that a writ of mandamus "do issue herein", etc., and it is contended that the judgment is defective in that it does not specify what the respondents are to do. Such an order is not defective where the prayer of the petition is clear and specific. (City of Geneva v. People, 90 Ill. App. 515, 517; Haines v. People, 19 Ill. App. 354, 359.) "The rule is, that the entry of a judgment must be either perfect in itself or be capable of being made perfect by reference as to other parts of the record in the case, or to the papers on file in the particular action." (Haines v. People, supra.) Referring to the prayer of the petition we find that the court is requested to issue a writ commanding the respondents, (1) "to take the

necessary steps to put into collection the said assessment", and (2) "to issue to petitioner the proper vouchers for work and labor done and materials used to the amount of $1548.03". We do not think that the court, under the allegations of the petition, would be justified in directing respondents to issue vouchers to petitioner in said amount, but we are of the opinion that the court could have properly commanded that respondents do the other acts mentioned. "A writ of mandamus may be issued for a part of the relief asked". (Illinois Match Case Co. v. Pearson, 140 Ill. 423, 438; People v. Board of Supervisors, 234 Ill. 68, 87.) And, under the facts as disclosed from the admitted allegations of the petition, the prayer that respondents be commanded by the court "to take the necessary steps to put into collection the said assessment, known as Bellwood Special No. 3", is sufficiently specific. (People v. Webb, 286 Ill. 364, 379.) Inasmuch as the order of the court was in effect that the writ do issue as prayed, and as petitioner was not entitled to all the things he asked for but was entitled to a portion of the relief prayed, we think it proper for us to reverse and remand the case with directions that the trial court enter the proper judgment. (McMulta v. Enoch, 124 Ill. 40, 46; School District v. School District, 33 Colo. 48, 51.) The judgment of the Superior court is accordingly reversed and the cause remanded, and the Superior court is directed to enter judgment in proper form commanding respondents and each of them to take the necessary steps to put into collection the said assessment known as Bellwood Special No. 3.

REVERSED AND REMANDED WITH DIRECTIONS.

October Term, 1912. No

42 - 18477.

PEOPLE OF THE STATE OF ILLINOIS, for use of the STATE BOARD OF HEALTH, Defendant in Error, vs. FRANK KLIMEK, Plaintiff in Error.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.

184 I.A. 59

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class commenced in the Municipal Court of Chicago against Frank Klimek, defendant, to recover the sum of $200 as a penalty for the second offense of violating the act to regulate the practice of medicine in this state, approved April 24, 1909, the particular violation charged being that of practicing medicine without a license. The jury returned a verdict finding the defendant guilty and that he had been previously convicted of practicing medicine in this state without a license, and assessing a fine of $200 against him. Judgment was entered on the verdict.

Two witnesses for the People testified to the effect that on November 2, 1911, the defendant practiced medicine. There was also introduced a record of the Municipal Court of Chicago to the effect that in case No. 314,382, entitled People, etc. v. Frank Klimek, on May 5, 1911, the defendant was found guilty by a jury of a violation of said act to regulate the practice of medicine in this state and assessed a fine of $100, and that judgment was entered on the finding and satisfied. Two witnesses, including defendant, testified on behalf of defendant, but defendant introduced no evidence to show that he had ever received a license from said State Board of Health.

It is contended by counsel for defendant that the judgment should be reversed because the People failed to prove that

defendant had no license to practice medicine. The burden was upon the defendant to show that he had such a license. (1 Greenleaf on Evidence, Sec. 79; Williams v. People, 80 Ill. App. 92, 95; 121 Ill. 84, 90; Noecker v. People, 91 Ill. 486; Kettles v. People, 221 Ill. 221, 229.)

The trial court orally instructed the jury that the People "must prove their case by a clear preponderance of the evidence", and it is contended that the jury should have been instructed that the charge against the defendant should be proved beyond a reasonable doubt. In our opinion the contention is without merit. This is not a criminal proceeding. "It was not a crime at common law to practice medicine without a license, and the statute does not make it a crime. Where an offense is created by statute and a penalty is fixed for its commission, which is to be recovered by an action of debt and not by prosecution, the action is civil and the rules of criminal pleading and procedure do not apply to it". (People v. Bartenstein, 248 Ill. 546, 551; Webster v. People, 14 Ill. 385, 387.)

The trial court further instructed the jury that if they found the defendant guilty in this proceeding they should "also find that the defendant has been previously convicted of practicing medicine in the State of Illinois without a license so to do". It is contended that the trial court erred in directing the jury to find that the defendant had been previously convicted of practicing medicine without a license. The argument is that the record of the Municipal Court introduced in evidence only showed that on May 8, 1911, the defendant was found guilty of "a violation of" said Act and did not show what the particular violation consisted of, viz: whether defendant practiced medicine without a license or whether defendant as an itinerant vendor violated the provisions of section 8 of said Act. In our opinion, the

contention is without merit in this court. At the conclusion of the trial court's entire charge to the jury, the only objection made by the defendant was to those portions "regarding the preponderance of the evidence". The objection which is here made for the first time was not specifically called to the attention of the trial court. (Pecararo v. Malberg, 346 Ill. 95, 97.)

We cannot say that the verdict is manifestly against the weight of the evidence. And we have considered the other points raised by counsel and are of the opinion that no prejudicial error was committed by the trial court. The judgment is therefore affirmed.

AFFIRMED.

October Term, 1912. No.
73 - 18517.

OSCAR D. OLSON, Executor of the will of GEORGE B. GIBSON, deceased,
Plaintiff in Error,
vs.
PENNSYLVANIA COMPANY, a corporation,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

184 I.A. 60

MR. JUSTICE CRIBLEY DELIVERED THE OPINION OF THE COURT.

This is an action of the fourth class, commenced in the Municipal Court of Chicago on September 13, 1911, by Oscar D. Olson, as executor of the estate of George B. Gibson, deceased, against the Pennsylvania Company, defendant below, to recover the sum of $350.33, together with interest, which said sum (as plaintiff claimed) Gibson had on deposit at the time of his death, April 1, 1909, in the Employees' Saving Fund of the Pennsylvania Lines west of Pittsburg. The nature of the defense, as disclosed by the affidavit of merits of the defendant, was that said sum of $350.33 was never a part of the estate of said deceased, that plaintiff never had any interest therein, that shortly after the death of said deceased the defendant paid said sum to the mother of deceased, Sarah A. Gibson, who was rightfully entitled thereto, and that said payment to the mother was made by and with the consent and approval of the plaintiff, as executor.

It appears from the transcript of the record that on November 8, 1911, a certain stipulation of facts was filed in the office of the clerk of the Municipal Court. It further appears from said transcript that on March 5, 1912, the hearing of the cause before the court without a jury was resumed, and that the court found the issues against the plaintiff and on the same day overruled defendant's motion for a new trial

and entered a judgment that plaintiff take nothing and that defendant have and recover from the plaintiff its costs, etc.

It further appears from said transcript that on April 5, 1912, plaintiff was given thirty days' additional time within which to file a "bill of exceptions", and that afterwards, on May 7, 1912, a certain "statement of facts", certified to by the trial judge, was filed in the office of the clerk of said court as follows:

> "This cause came on for hearing on the 8th day of November, A.D. 1911, and both the plaintiff and defendant were present in open court and represented by counsel. Said cause was heard by the court without a jury on the hereinbefore contained stipulation of facts and upon the arguments of counsel. No evidence was offered in court by either the plaintiff or defendant, save the stipulation of facts, and thereupon the plaintiff rested and the defendant also rested, and thereupon the court found the issues for the defendant and entered judgment on the finding for costs in favor of defendant and against the plaintiff."

The stipulation of facts referred to in said "statement of facts" is not appended to or in any way made a part of said "statement of facts". A stipulation of facts, purporting to be signed by the attorneys for the respective parties, appears in the transcript of the record as having been filed in said cause on November 8, 1911, but that does not make it a part of the record so as to be subject to examination by this court. (Chicago, etc. Ry. Co. v. Benham, 23 Ill. App. 240; Wilson v. Boudwell, 85 Ill. [illegible]; People v. I. & St. L. R. & C. Co., 122 Ill. 500; Easton v. Modern Woodmen of America, 116 Ill. App. 291; Rayner v. Modern Brotherhood of America, 187 Ill. App. 510, 517.) And a document or instrument cannot be incorporated in a bill of exceptions by reference thereto. (Aalish v. City of Chicago, 219 Ill. 135, 137; Frank v. City of Chicago, 216 Ill. 607, 608; Hermesay v. Metzger, 83 Ill. App. 633.) And in the absence of a "correct statement of the

facts appearing upon the trial" it must be presumed by this court that there was sufficient evidence to warrant the finding and judgment. (Chicago, etc., Ry. Co. v. Benham, supra; Wilson v. McDowell, supra; Lindgren v. Swartz, 40 Ill. App. 488.) The judgment is affirmed.

AFFIRMED.

Calendar Term, 1913. No.

90 - 18834.

1841.A.61

N. MAZZARELLA, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
OLIVES KAMBEROS, Defendant in Error.	)	OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted by N. Mazzarella, plaintiff below, to reverse a judgment for $20 rendered against him and in favor of Olives Kamberos, defendant below.

It appears from the transcript of the record that plaintiff commenced an action of the fourth class, in contract, in the Municipal Court of Chicago against the defendant, claiming that the sum of $50 was due him for certain merchandise sold and delivered to the defendant; that the defendant entered his appearance and filed a statement of set-off or counter-claim, in which he admitted that he owed plaintiff the said sum of $50, but claimed that because of a transaction unconnected with plaintiff's cause of action plaintiff was indebted to him in the definite sum of $70, and that plaintiff owed him a balance of $20; that to this statement of set-off the plaintiff filed an affidavit of merits, in which plaintiff did not dispute the amount of the defendant's claim of set-off, viz: $70, but made certain allegations which, if proved, would have tended to show that plaintiff was under no obligation to pay defendant the said sum of $70.

It further appears from said transcript that on March 9, 1912, the trial of the cause was resumed before the court without a jury and that the court, after hearing the evidence and the arguments of counsel, found the issues against the plaintiff on defendant's claim of set-off and assessed the defendant's

damages at the sum of $20, and entered judgment on the finding.

We fail to find in said transcript of the record any statement of the facts appearing upon the trial, or any stenographic report of the proceedings, or any bill of exceptions, signed by the trial judge.

It is contended by counsel for plaintiff that the court erred in denying plaintiff's motion to strike the defendant's statement of set-off from the files. The transcript of the record does not disclose that such motion and ruling were made.

It is also contended that the court erred in entering the judgment because defendant's counter-claim was for unliquidated damages arising out of a contract unconnected with the subject matter of plaintiff's suit and, therefore, was not the proper subject of set-off. We cannot say that defendant's counter-claim was for unliquidated damages.

In Robison v. Hibbs, 48 Ill. 408-9, the word "liquidated" is defined to mean "that which is made certain and manifest; as liquidated damages, ascertained damages; liquidated debt, or ascertained debt as to amount", and an "unliquidated claim" is defined as "one which one of the parties to the contract cannot alone render certain." In East v. Cros, 70 Ill. 91, 94, it is held that items for work and labor performed, board, goods sold and delivered, and money, etc., are not unliquidated damages and may be set off in an action ex contractu. See, also, Kelley, Maus & Co. v. Gaffney, 79 Ill. App. 278, 279; Ideal Coated Paper Co. v. Cupples Envelope Co., 149 Ill. App. 484, 488. In the last mentioned case it is said: "Statutes of set-off, being regarded as remedial acts, tending to prevent circuity of action and thus to settle controversies speedily, are to be liberally construed."

The burden of proof was on the defendant to establish the existence and validity of his claim of set-off by a preponder-

ance of the evidence. (East v. Crow, supra.) And in the absence of a statement of facts, stenographic report, or bill of exceptions, it must be presumed in this court that there was sufficient evidence to warrant the finding and judgment. (Wilson v. McDowell, 68 Ill. 582; Chicago, etc. Ry. Co. v. Benham, 25 Ill. App. 248.) The judgment is affirmed.

AFFIRMED.

March Term, 1912, No.
270 - 18310

HELEN ILES,
Plaintiff in Error,

vs.

INTER OCEAN NEWSPAPER COMPANY,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

184 I.A. 63

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

The plaintiff, Helen Ives, brought an action for libel in the Superior Court against the Inter Ocean Newspaper Company. The jury found the defendant not guilty and to reverse the judgment of nil capiat entered on the verdict the plaintiff prosecutes this writ of error. One of the articles alleged to be libelous was the following, published in the newspaper of the defendant February 24, 1908:

"TELEPHONE GIRL IS A BOY.

HELEN ILES FALLS IN LOVE AND LOSES HER PLACE.

St. Louis Exchange Startled by Confession of an Operator Claiming to Come from Chicago.

Special Dispatch to The Inter Ocean.

St. Louis, Mo., Feb. 23, There was consternation among the operators of the Forest telephone exchange when Helen Iles confessed that she was not a girl at all, but a boy in disguise.

When the dreadful truth became known to her chum, those who had been especially intimate with her began to reflect upon just how many secrets of theirs she had shared.

Helen Iles was a favorite with all of the operators.

HAILS FROM CHICAGO.

It was about five months ago that a slender, graceful young girl, neatly attired in a brown skirt, sailor waist, long tan coat and fluffy hat, applied for employment as an operator.

The applicant said she was Helen Iles, aged 22, of Chicago, and had had experience in the work in Chicago Exchanges. She possessed a clear voice, which is one of the chief qualifications of a telephone operator.

HELEN FALLS IN LOVE.

A change came over Helen's mood a few weeks ago, when a new operator, a tall, stately, dashing brunette, whose name is Margaret, was assigned to the exchange. Helen immediately manifested a peculiar infatuation for Margaret and sought her society

in leisure moments to the exclusion of the other girls.

Helen sought Margaret in the rest room during an interval of rest a week ago, confessed that he was a man, and declared that he loved her and could not live without her. Margaret repulsed him and immediately sought Miss Burns, the chief operator, who ordered Helen's immediate discharge."

Another article also alleged to be libelous related to the same subject matter.

The defendant pleaded the general issue and gave notice of special matter. The notice is in paragraphs separately stated and numbered. No one of them, nor all of them taken together, amount to a statement of facts which if proved would be a justification of the article on the ground that the matters published were true. The concluding portion of the last paragraph of the notice is as follows:

"While not contending in this case that the plaintiff is in fact a male, the defendant will attempt to justify the article, and prove that the substance of the article is true, and that the plaintiff did in fact make the confessions alleged in said article and conducted herself in the manner indicated and suggested in said article."

A plea or notice justifying the words as true must aver the truth of the very charge.

Dowie v. Priddis, 216 Ill. 553.

Defendant called as a witness Lillian Thomas, who testified to conversations with plaintiff and with her mother in her presence occurring nearly two and a half years after the publication and only a few months before the trial. Over the objection of plaintiff the witness was permitted to testify to most disgraceful acts and conduct on the part of the plaintiff occurring a few months before the trial, to the use of profane and improper language at the same time and to statements by the plaintiff's mother in her presence about the same time of improper conduct on the part of the plaintiff. In this we think the court erred. Evidence of facts occurring two years and longer after the publication do not tend to show either the truth of the

publication, nor is such evidence admissible in mitigation of damages. Evidence of general bad reputation of the plaintiff is admissible under the general issue in mitigation of damages, but it is a general rule that the character of a party cannot be impeached by proof of special acts, for no person is supposed at all times to be prepared with the proof of every individual act, but is presumed at all times to be prepared to support his general character. None of the acts, conduct or language testified to by Lillian Thomas is mentioned in the notice of special matter. The fact that defendant's counsel on cross-examination interrogated plaintiff as to the matters testified to by Lillian Thomas and she denied that they occurred did not make the testimony of Lillian Thomas as to such matters admissible. It was cross-examination on collateral or irrelevant matters and the defendant was bound by the answers and had no right to contradict them.

Plaintiff testified that she worked in a St. Louis telephone exchange for five months and was asked by defendant's counsel on cross-examination, "Was it during this five months that you were in St. Louis that your mother was in the penitentiary?" The court sustained an objection to the question, but the vice was in the question, which was a statement of a fact as well as a question. It is the province of counsel to ask questions, not to state facts. The question was so framed that the answer "No sir" may be held not to deny that plaintiff's mother was in the penitentiary, but only to deny that she was there during the five months that plaintiff was in St. Louis. The question asked of plaintiff in relation to her mother, "She has been married eight times, hasn't she?" and other questions of the same character were improper. Plaintiff's mother was not a witness and the

number of times she had been married and the kind of language she used were not proper subjects of inquiry.

Instruction 6 given for the defendant is as follows:

"You are instructed that the defendant is not required to justify the exact words in the publication complained of. It is a sufficient defense in this case if the defendant has proven by a preponderance of the evidence that the substance of the whole article is true."

The defendant did not justify the publication on the ground that it was true. Under a plea or notice of justification the substance of the charge contained in the publication must be proved to be true to constitute a defence.

The principal charge in the publication was that the plaintiff was a boy disguised as a girl, and there is in the record no evidence tending to prove the truth of this charge.

Instruction 7 given for the defendant is as follows:

"If you find from the evidence in this case, by a preponderance of the evidence, that the purport of the publication complained of was as the plaintiff sets forth in the declaration, a charge that the plaintiff was masculine in her behavior and was guilty of acts indicating undue affection and passion for women, and if you further believe from a preponderance of the evidence that such charge has been proved and is true, and that the defendant was not guilty of actual malice in the publication of the article, then you will find the defendant not guilty, even though it be true that the defendant is a woman and not a man."

The purport of the publication was a question of law for the court, not of fact for the jury. It was in part a charge that plaintiff was not a girl, but a boy in disguise, and not a charge that the plaintiff was masculine in her behavior and guilty of acts indicating an undue affection for women, as stated in the instruction and proof of the behavior and acts stated, would not amount to proof of the truth of the publication. The first sentence of defendant's instruction 20 is as follows: "Unless you believe from a preponderance of the evidence that the article complained of was untrue you must find the defendant not guilty."

The plea of not guilty denies the act charged in the

declaration only, and the truth or falsehood of the charge can not be inquired into under that issue.

Sheahan v. Collins, 20 Ill. 325;

Ranson v. McCurley, 140 id. 635.

Other instructions given for the defendant are subject to criticism on the grounds already stated, but in view of what has been said we do not deem it necessary to state in detail the respects in which such instructions are in our opinion erroneous.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

288 - 18328

March Term, 1912, No.

JOHN F. DEVINE, Administrator of JOSEPHINE WELTER, deceased, Appellant,

vs.

NORTHWESTERN ELEVATED RAILROAD COMPANY, a corporation, Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

184 I.A. 64

This was an action against the defendant railroad company for negligently causing the death of plaintiff's intestate, in which there was a verdict of not guilty and a judgment of nil capiat, to reverse which plaintiff prosecutes this appeal. The defendant company operated a double track electric railroad which crossed Lunt avenue, an east and west street, at grade. The railroad runs north and south and at Morse avenue, the next avenue south of Lunt, is a station the platform of which extends north to within 125 feet of Lunt avenue. There were gates on each side of the track at the crossing, consisting of a long arm which closed the street and a short arm which closed the sidewalk when down. These arms were hung on iron posts which stood in the street near the outer edge of the sidewalk. From the short arm of the gate was suspended lattice work, which came so near the ground that a person could not pass under it when the gate was down even by stooping. Just south of the south line of Lunt avenue between the tracks was a tower, in which was a tower man, who had charge of the crossing and raised and lowered the gates. Deceased approached the crossing from the west on the south side of Lunt avenue about midnight. With her was a young man, Nicholas Sweig. He testified that the gate was part of the way up; that deceased was some feet ahead of him and stooped and went under the gate; that he saw the train coming from the south; that it was ten feet from deceased when she

started to cross the tracks. The motor man and the tower man testified that the gate was not raised after a southbound train had passed and the motor man testified that deceased went under the gate on the street side of the post on which the gate was hung, and as she came on the track was struck by the car. The car did not stop at the Morse avenue station, and there was evidence tending to show that it ran across Lunt avenue at a rate of speed exceeding ten miles per hour, the rate limited by the ordinance counted on and proved, and also that the cars usually stopped at the Morse avenue station.

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

The contention of appellant that the defendant was not entitled to an instruction that if the deceased was guilty of negligence which contributed to the accident they should find for the defendant, and at the same time to a special finding whether she was in the exercise of proper care and caution for her own safety at the time of the accident which resulted in her death, cannot be sustained. The statute provides that in any case in which the jury renders a general verdict they must, on the request of a party, be required to find specially, "upon any material question or questions of fact."

Complaint is made that the trial court sustained the objections of the defendant to two questions asked of Olson, the motor man, and to two questions asked of the tower man by plaintiff's counsel on cross examination. The questions all related to matters touching the negligence of the defendant. The jury answered in the negative the question submitted to them, "Was

the deceased, Josephine Welter, in the exercise of due and proper care and caution for her own safety at the time of the accident which caused her death?" In view of this special finding we do not think that the judgment should be reversed because the court sustained the defendant's objections to said questions.

It is not contended that the verdict is so manifestly against the evidence, either on the question of the negligence of the defendant or the contributory negligence of the deceased, that the court erred in denying plaintiff's motion for a new trial.

The remaining contention of appellant is, that the judgment should be reversed for error in certain instructions given for the defendant. We do not agree with the contention of appellee that the case is, on the evidence, one in which we can say that the judgment should not be reversed for what would otherwise be reversible error in the instructions on the ground that any other verdict than that which was rendered must have been set aside as contrary to the evidence. In instruction 14 the jury were told that in order to find a verdict for the plaintiff they must believe from the evidence inter alia, "That the deceased was in the exercise of due and proper care and caution for her own safety as defined in these instructions, at and just before the time of the accident complained of". In no instruction given is there a definition of "due and proper care and caution" or of "ordinary care". It is doubtful whether any attempted definition of the words used would have made their meaning clearer. Such definitions are little more than a statement of the same idea in different language, and we do not think the judgment should be reversed because of the failure to define such words. Neither do we think that the omission to state in the instruction that the failure by the deceased to exercise due and proper care for

her own safety which would prevent a recovery by the plaintiff, was limited to cases where such failure caused or contributed to the injury and death of the deceased, and without which the injury would not have occurred, was reversible error.

The record in our opinion is free from reversible error, and the judgment is affirmed.

AFFIRMED.

1912, No.

310 - 18350

JOSEPH HABER,
Appellee,

vs.

W. A. JONES FOUNDRY & MACHINE COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

1841.A.70

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiff Haber was in the service of the defendant corporation and was operating a lathe used to turn and finish iron pulleys. While so engaged his right thumb was caught in the gear called speed gear and two-thirds of it taken off. In tort for negligence he had a verdict and judgment for $1,000 damages and the defendant appealed.

In the centre of the lathe was the stationary part, on each side of which was a table that could be moved to the proper distance from the stationary part, depending on the diameter of the pulley to be turned, which varied from twenty-six to fourteen inches. The pulley was held in place by stays on either side and by shafts which engaged through a hole in the hub of the pulley. The table once set remained stationary. Next to each table was a carriage containing a shaft, in which was cut a spiral groove and to which was attached a frame carrying a knife which scraped the pulley. The knives were attached to the grooved shafts and as the shaft revolved the knives moved very slowly across the face of the pulleys. To place a knife in proper position the operator with one hand, by means of a crank at the outer end of the shaft, revolved the shaft and thereby moved the knife. At the inner end of the grooved shaft was a

wheel with cogs or teeth and at the end of the driving shaft was a clutch with cogs or teeth. To couple the two shafts together the clutch was moved against the wheel and when the teeth in the clutch engaged with the cogs or teeth in the wheel the two shafts were coupled together and as the shaft revolved the knives were moved up and down on the face of the pulley. In starting the lathe the operator with one hand, by means of the crank, revolved the shaft and when the knife was in proper position he shoved the clutch into place with the other hand, so that it engaged with the wheel and thereby the two shafts were coupled together.

From the evidence the jury might properly find that some days before the accident some of the teeth in the wheel at the end of the grooved shaft were worn and broken, so that when the clutch was thrown in it would fly out and the two shafts thereby become disengaged and uncoupled.

Plaintiff spoke only the polish language, but had picked up a few words of english and german. He, through Levicke, who spoke both english and polish, complained to Aulie, the assistant foreman, under whose immediate control and direction he worked, that the gears were worn out and the clutch would not stay in place, and Aulie said he would fix it. Two days later plaintiff spoke to Aulie about the defective condition of the gear coupling appliance, using a mixture of german and english, and Aulie again said, "I will fix it" and told plaintiff to go on working. On the day of the accident plaintiff again complained to Aulie of the defective condition of the coupling appliance, again using a mixture of english and german, and while he and Aulie were working at the lathe the clutch sprang out and Aulie said that he would fix it and that plaintiff should go on and work. Aulie then brought a pulley

only fourteen inches in diameter and plaintiff adjusted the table and then, to set the grooved shaft in motion, took hold of the crank at the end of the shaft with one hand and the clutch with the other and attempted to shove the clutch into place. Then, according to plaintiff's testimony, "because the teeth were broken it sprung out;so that my finger might not be crushed I quickly drew back my hand", and it was caught in the speed gears and the injuries complained of thereby inflicted. The speed gear was only a few inches from the clutch when the table was set for a fourteen inch pulley.

The testimony of plaintiff as to his complaints to Aulie of the defective condition of the coupling appliances, his promises to repair and his directions to plaintiff to continue to work, is not contradicted.

We find no error in the rulings of the court on questions of evidence nor in the instructions given for plaintiff. The contention of appellant that plaintiff assumed the risk, "because he was injured more than four hours after it is claimed that defendant promised to repair the lathe; the repairs undisputably could have been made within that length of time", can not be sustained. Whether plaintiff continued in employment longer than a reasonable time was a question of fact for the jury.

Scott v. Parlin and Orendorf Co., 245 Ill.460.

On a careful examination of the evidence in the record we cannot say that the verdict was so clearly against the evidence that the trial court erred in denying defendant's motion for a new trial.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

March Term, 1912, No.
170 - 18204

184 I.A. 74

HYMAN PINTER by FRANK MAJCAN, his next friend, Defendant in Error,

vs.

BUNTE BROTHERS, a corporation, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The judgment of $1000 attacked by this writ of error was rendered by the Municipal Court of Chicago December 23, 1911. It was entered on the verdict of a jury in an action for damages for personal injuries suffered by the plaintiff Pinter while in the employ of the defendant, Bunte Brothers, a corporation, through, as was alleged in the amended statement of claim filed in the court below, the defendant's negligence.

The neglect specifically indicated in the plaintiff's argument in this court, defending the verdict and the judgment, is the failure of the defendant properly to warn the plaintiff of, and instruct him how to avoid, a danger connected with his employment.

Counsel for the plaintiff admit that the danger may have been obvious, but insist that the court, because of the plaintiff's youth, his lack of intelligence and of mental capacity and his inexperience, was right in leaving to the jury the question whether he understood and appreciated it.

Counsel for the defendant maintain on the other hand that the plaintiff assumed the risk of his employment and that the evidence was such that at the close of the plaintiff's case the trial Judge should have peremptorily instructed the jury to find for the defendant.

The rule of law in this State affecting the contention is not doubtful. It was thus expressed by us in Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472:

"If conceding to be true all that the evidence tends to prove in favor of the plaintiff it would be apparent to all reasonable minds that such dangers as the evidence thus tends to prove were incidental to and connected with his employment, that they were not concealed or latent, but patent and obvious, that they were not extraordinary and unusual, but usual and incident to the business engaged in as conducted by the defendant, and existed continuously during the plaintiff's employment, and if there is no evidence tending to show that plaintiff ever complained of them or that the defendant promised to remedy them, or that plaintiff had been ordered to incur them by some particular and especial order at the time of the accident, but on the contrary it is proven that he was then engaged in the regular line of his duties and usual employment, and that he was of mature age and of ordinary strength and intelligence, then the question of whether he understood and appreciated the danger (such understanding and appreciation being recognized by the Supreme Court as essential elements in the assumption of risk) is answered by a conclusive presumption, and the assumption of risk by the plaintiff becomes a thing for the court to assert as a matter of law, not a question of fact to be left to the jury. In other cases it is for the jury to say whether the risk was assumed."

For the accuracy of this statement of the rule we think Western Stone Co. v. Muscial, 196 Ill. 382, Illinois Steel Co. v. Ryska, 200 Ill. 280, and C. & E. I. R. R. Co. v. Neery, 203 Ill., 429, and Pressed Brick Co. v. Heininger, 41 Ill. App. 524, - 146 Ill. 534, are authority. In the case at bar we have to decide whether the court below properly left to the jury the question, "Did the plaintiff, in the absence of warning and explanation, understand and appreciate the danger which resulted in his injury?"

The injury for which the plaintiff recovered was the loss of his right hand thumb.

While there is a conflict in the testimony as to some details, the jury might, we think, reasonably find that the following were the facts relating to the accident. The plaintiff was seventeen years of age and had worked for the defendant

corporation for about four months. Up to the day of the accident he had worked on a "starch machine" used for the purpose of separating candy from the starch in which hot candy had been dropped for the purpose of cooling. The hot candy would be dropped into trays filled with starch and after the candy had cooled the trays would be carried to the starch machine and an operator would dump the contents of the trays into a hopper. The same operator would then place the empty trays upon "a chain conveyor" running in "a conveyor box", which was a part of the machine. This conveyor consisted of two chains running over sprocket wheels at the front and rear of the machine. It carried the trays through to the rear of the machine, during which journey they would become filled again with the starch which had been separated in the machine from the candy. Another operator would remove the trays from the conveyor, level off the starch in each one with a stick, and pile the trays thus filled with starch upon each other to be afterward again used to drop the hot candy in. In the machine, but at a distance from the conveyor box, was a spout from which the candy after its separation from the starch poured out into empty trays placed there to receive it. A third operator in the working of the machine would place these empty trays under the spout and when they were filled with candy take them away into another room.

The plaintiff was from the time of his first employment until the morning of the accident engaged only in the work which is above ascribed to the third operator, that is, taking the trays filled with candy from the spout into another room. (This is denied, however, by the defendant.) The two other men working on the machine were respectively twenty-five and thirty years of age. They fed the machine, removed the trays filled with starch and cleaned the machine. This cleaning was rendered

necessary once a day at least, so far as the conveyor box was concerned, by the fact that the chains and gearing wheels over which they ran became clogged up with starch falling over the sides of the trays, which were carried along the conveyor through the machine, and filling the box. A brush was used to remove the starch thus filling the box and clogging the chains and wheels; but the cleaning was always done when the machine was stopped either for the purpose or because the day's work was over.

On the morning of the accident the machine we have described was out of order. There were several machines, however, in the two rooms used by the defendants, doing the same work, and the foreman of the defendant ordered the three operators who worked on it, including the plaintiff, to go to work on one of these other machines which was in the other of the two rooms. According to the statement (borne out by the evidence) of the plaintiff in error -

"This machine did the same work and was operated in the same manner as the other. The parts, however, were somewhat differently arranged. * * * * The conveyor instead of running through the side of the machine ran through the entire near the bottom. Instead of having two chains, the conveyor had one only, which carried cross pieces on which the trays rested. It was about five feet from the front to the rear sprocket wheel and it took half a minute for the conveyor to run that distance. On the first machine the belt shifter by which the machine was started and stopped was over the centre of the front of the machine. On the second machine the belt shifter was at the side."

The plaintiff with the other two men began to operate the machine (which was already running) at half past seven in the morning. At this machine, however, he was engaged in dumping the trays filled with starch and candy into the hopper and placing the empty trays on the chain conveyor - the work before described as that of the first operator on the machine he had been attending. The plaintiff was told by the foreman to do this

work and that he must clean the machine when it became full of starch, and that there was a brush on top of the machine to be used for that purpose. (This conversation is denied by the foreman, but it seems to us from a consideration of the record that the jury might reasonably have found the plaintiff's version of the directions received by him to be correct.)

About two hours after beginning his work on this second machine the plaintiff was cleaning the gearing on the conveyor box with this brush, the machine meanwhile running. While the plaintiff was thus engaged the thumb of his right hand was caught between the chain and sprocket and crushed so that amputation was necessary.

As we have said, there is no insistent contention that the danger of injury in attempting to clean the running gear and conveyor box while the machine was running was not obvious, but there is a dispute and a conflict in the evidence as to what opportunities of observation and what experience, concerning the running and the cleaning of the similar conveyor on this first machine the plaintiff had.

The plaintiff testified that he never performed any duty, in connection with the first machine, but that of carrying trays filled with candy from the machine into another room. Several witnesses for the defendant said they had seen him working at each of the three stations on the machine. The plaintiff testified he knew little about the method of cleaning the first machine, although he knew it was cleaned once a week, as he thought, whether when running or not he did not seem to know. There was testimony on the part of the defendant tending to show that he must have known and that he actually did know about these matters and that he had taken part in the cleaning of the conveyor box and gearing on the first machine. The foreman testi-

fied that he was the man who put the plaintiff to work on the first machine; that he showed him "just once" the first day of plaintiff's work how to put candy into the first machine, how to take it out at the other end and how to take the trays away and pile them up; but that on the morning that he set him to work on the second machine he said nothing else to the three men or either of them but "You three fellows work there."

The defendant points out that the plaintiff's evidence is in some respects apparently contradictory and, as he argues, disingenuous, so that little credence can be given it.

The plaintiff was undoubtedly of a low order of intelligence and could testify only through an interpreter, and his evidence was to that extent unsatisfactory; but the jury were the proper judges of its credibility, as of that of the other witnesses.

It is undisputed that the plaintiff at the time he was employed was a freshly arrived immigrant from a small village in Austrian Hungary, where he had lived on a farm and never seen machinery. He had been employed in herding cattle since he was ten years of age, had never been to school, and was unable to read or write.

There have been two trials of this case, in each of which the jury returned a verdict for [illegible].

The jury in the present trial were, as we think, properly instructed as to the questions of contributory negligence and assumption of risk. They were further instructed that -

"in the case of a minor or person of immature age the law makes it the duty of the employer to instruct the servant as to the dangers of the employment, if any, which the employer knew, or by the exercise of ordinary care might have known, and to show him the way to avoid such danger, and that the burden is on the plaintiff to prove such duty on the part of the defendant. If,

however, you believe from the evidence that the plaintiff's experience on the first machine was such as to cause him to understand the method of operation of the second machine, and the dangers connected therewith, then the defendant was not required to warn him of such danger.

The law also requires a servant to exercise ordinary care and attention to learn the dangers which are liable to beset him in his work. x x x x If the plaintiff in this case by the exercise of such care on his part, just before and at the time in question, could have avoided the injury in question, then he cannot recover. The law, however, does not require a person of immature age to exercise the same degree of care and caution as a person of mature age. He is, however, required to exercise and is held to that degree of care and caution that a person of his age, intelligence, experience, capacity and ability to comprehend danger and care for himself might reasonably exercise under like circumstances."

We think these instructions, in connection with what was otherwise said to the jury on the subjects of contributory negligence and assumption of risk, fairly presented the question that the jury had to solve, and we do not think the court erred in refusing to instruct the jury to find for the defendant.

Nor, although the case on the facts was not free from difficulty, was the verdict of this second jury, repeating that of another, in our opinion so against the clear weight of the evidence, assuming the law to be rightly apprehended by them, that we should be justified in disturbing it on that ground.

We do not think that the [illegible] of the introduction of immaterial evidence - if it were an error - was harmful or injurious to the defendant. As counsel points out, the evidence objected to showed that the boy, orphan though he was, had friends rather than was destitute of them. The damages were certainly not unwarrantably swelled by it, for they are not and could not be, in the court in which the action was brought, excessive for the injury suffered.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

March Term, 1912, No.
245 - 18284

BLONDON FIELDSTACK,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Defendant in Error.

184 I.A. 75

ERROR TO THE SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out to reverse a judgment of nil capiat and for costs against the plaintiff in error here and plaintiff below, Blondon Fieldstack, in a suit brought by him against the Chicago City Railway Company, the defendant in error here and defendant below.

The suit was based on the alleged negligence of the defendant company. The counts of the declaration on which the case went to trial thus describe the alleged negligence and its results. The first count alleges that the Railway Company being in possession and control of and operating a railway system, street cars and street car tracks along State street in Chicago at the intersection of 45th street; that it was the custom of the defendant to stop its cars at or near 45th street; that the defendant had strown and piled on and along State street at this place, in close proximity to said street car tracks, large quantities of dirt, cinders and other materials and had thereby raised the level of the roadbed above the level of the street car tracks and had constructed and left in the street a slanting place from the level of said street so raised downward to the street car tracks; that the defendant then negligently plowed, shoved and threw large quantities of snow along said street and upon said slanting place, which thereby became slippery and covered with snow and ice and dangerous to persons alighting from

said street cars; that the plaintiff, being in the employment of the defendant, was riding on one of its street cars along State street in a northerly direction from his place of employment towards his home as a passenger; that when said street car reached the said place it caused the car to lessen its speed, and while it was moving slowly and the plaintiff, in the exercise of ordinary care for his own safety, was attempting to and was in the act of alighting from the said car, he stepped on said slanting portion of said street and by reason of the slippery and slanting condition of the same slipped and fell and was thereby thrown upon the ground and under said car, and that the wheels of said car ran over him, by reason of all which he was injured and became permanently crippled.

The other fifteen counts do not materially differ in their allegations from this one.

Some mention a public crosswalk on the north side of 45th street as intersecting State street. Some omit the allegation concerning dirt and cinders and other materials and allege the negligent piling of ice and snow hardening into ice at said intersection and along said street and crosswalk. Some omit the allegation or recital that the plaintiff was in the employ of defendant and allege merely that he was a passenger. Others omit the allegation that he was a passenger and state only that he was an employe and that the persons responsible for the negligence were not his fellow servants. By permutations and combinations of these varying allegations the fifteen counts are made up.

The cause was submitted to a jury, which found a verdict for the defendant, on which the judgment attacked by this writ of error was, after a motion for a new trial and a motion in arrest had been denied, entered by the court.

A bill of exceptions is incorporated in the record which, while not purporting to give all the evidence, contains all the testimony given on direct examination by the various witnesses adduced on each side. The cross-examination in each case is omitted.

No contention is made that the verdict was contrary to the weight of the evidence, but the case of the plaintiff in error in this court is placed entirely on alleged error in giving to the jury certain instructions complained of. These instructions are those numbered 7, 8, 9, 10, 11, 12, 13, 15, 18 and 19. They are discussed at length by counsel for both parties in their respective briefs herein, but it would be a useless undertaking for us in this opinion to attempt to follow the entire course of the arguments and discuss or distinguish the many cases cited in support of the respective contentions. The principal objections urged and our opinion thereon will be briefly noted. To do this, however, so as to make this statement clear, it is necessary to recite some of the instructions objected to in full and to give abstracts of the others.

Instruction 7 is in full:

"The jury are instructed that if they find from the evidence that the plaintiff attempted to alight from the car in question while it was in motion and that his conduct in doing so was a want of ordinary care for his own safety which proximately contributed to the injury, then he cannot recover in this case."

Instruction 8 is in full:

"If it appears from the evidence that the plaintiff attempted to alight from the car in question while it was in motion, and that his fall and injury were due to that fact, and that such conduct on his part was a want of ordinary care for his personal safety, then the jury are instructed that he can not recover in this case and their verdict should be not guilty."

Instruction 9 in full is:

"The jury are instructed that if it appears from the evidence that the car in which the plaintiff was riding on the occasion in question was slowing to stop and did proceed regularly to stop, and if they further believe from the evidence that the plaintiff did not wait for the car to come to a stop, but attempted to alight from it while it was in motion, and that

such conduct on his part was negligence and a want of ordinary care for his own safety which proximately contributed to the injury in question, then the plaintiff cannot recover in this case and your verdict should be not guilty."

Instruction 10 is the general proposition that the jury are not required to believe any statement to be a fact simply because a witness has sworn it to be, and concludes -

"if after such consideration of all the evidence in the light of your own common observation and experience as men in the affairs of life, you are unable to say that the plaintiff has proved by a preponderance of the evidence that the injury occurred by reason of negligence on the part of the defendant Chicago City Railway Company, and that P. A. Fieldstack was exercising ordinary care for his own safety at or before the time of the accident, as explained in other instructions, then the jury should find the said defendant Chicago City Railway Company not guilty."

Instruction 11 in full is:

"Ordinary care and prudence is the exercise of that care which every person of common prudence bestows upon his or her affairs and concerns and the prudence and vigilance which reason and law require a person to exercise for his or her own safety must be proportionate to the danger and exercised with reference to the situation and position such person is about to take or in which such person finds himself or herself."

Instruction 12 is in full:

"The court instructs the jury that while they are the judges of the credibility of the witnesses they have no right to disregard the testimony of an unimpeached witness, if any, sworn on behalf of the defendant, simply because such witness was or is an employe of the defendant and it is the duty of the jury to receive the testimony of such witness in the light of all the evidence the same as they would receive the testimony of any other witness, and to determine the credibility of such employe by the same principles and tests by which they determine the credibility of any other witness."

Instruction 13 begins -

"It is not every accident that makes a railway company liable for damages to the person injured by its cars" -

and then proceeds to say that if so far as the defendant was concerned the accident was unavoidable, the jury should find it not guilty.

Instruction 15 is:

"The court instructs that it was the duty of the plaintiff to have used his faculties with ordinary and reasonable diligence and care on the occasion in question to avoid danger and injury to himself, and if you find from the evidence that he failed to do so, and that such failure was negligence which contributed to the injury, then the plaintiff cannot recover from the defendant in this case."

Instruction 18 is similar to instruction 13 in the statement that if the accident happened through other causes than the negligence of the defendant, there was no liability on its part. It begins -

"It is not every accident that makes a railroad company liable for damages to a person injured getting on or off one of its cars."

Instruction 19 states the rule that in order to recover the burden is on the plaintiff both to prove the negligence of the defendant and also that he himself was in the exercise of ordinary care for his own safety.

Against instructions 7, 8, 9, 13 and 18 one general objection is made by the plaintiff in error. It is that they are misleading in this case because they were drawn on the theory that the negligence charged is the negligence of the defendant in the operation of its car, and therefore they tended to create a false issue in the minds of the jury.

We do not see why they were not proper instructions on the subject of due care on the part of the plaintiff. He alleged his own due care, the allegation was material and he was, in order to recover, obliged to prove it, whether it was the fault of the company in rendering the street dangerous or its fault in operating the car that caused the accident.

Instruction 13 is more open to the objection perhaps than the others, because it speaks of "a person injured by its cars". But we do not think it reversibly erroneous or that it could have misled the jury. The plaintiff was "injured by the car", although the negligence charged was not in its operation.

Instruction 9 is made the subject of further particular animadversion for several reasons, but we do not think the grounds are well assigned. We think the position of the defend-

ant's counsel is correct, that "The instruction left it to the jury to determine from all the evidence whether the plaintiff was injured by reason of the conditions that existed in the street, or whether they were the result of his own conduct in alighting from the car while it was in motion and without waiting until it was stopped, as it was, at the regular stopping place at that intersection." Indeed, after all is said, that was the sole question that the jury were both actually and theoretically called on to decide, and instructions cannot be properly called misleading that presented that question and the law bearing on it correctly.

Instructions 10 and 12 are on the tests to be applied by the jury to the weight of testimony. The particular objection as to 10 is that the name of B. A. Fieldstack, the plaintiff, was introduced into it. There is no force in the objection, which is based on the expressions of the Supreme Court that a witness should not be singled out by name in an instruction for the purpose of discrediting his testimony. The plaintiff's name is not mentioned as a witness in this instruction, but simply as the plaintiff.

In instruction 12 the use of the word "receive" is objected to, and it is said that in the expression "it is the duty of the jury to receive the testimony of such witness", it means, according to standard usage, "admit as true." No person, we think, familiar with the English language, would so understand it in this connection. The meaning attributed to the word "receive" by counsel is a secondary one, and the word would only be so interpreted when the context showed it to be used out of its ordinary and primary sense.

A somewhat similar objection, although we think better

founded, is made to the word "vigilance" in instruction 11. We do not commend the use of the word, but we do not consider it reversible error or that it could be reasonably supposed to have misled the jury in this case.

If, as counsel says, "vigilance" is sometimes defined as "alert and intent mental watchfulness in guarding against danger", it is also defined more often and more commonly simply as "care" or "prudence".

It is also said that the plaintiff's duty to exercise care was not by the 11th instruction confined to the time and place of the accident. We do not find it open to any objection on this ground. The instruction does not direct a verdict, but states an abstract proposition of law defining "ordinary care" and referring the definition, properly we think, "to the situation and position" a person "is about to take", or in which he "finds himself".

This last objection noted to instruction 11 is also made to instructions 15 and 19. Instruction 15 confines the description of the duty of the plaintiff to "the occasion in question", and instruction 19 could not by any possibility have been understood by the jury to allude to any other time.

We think that the issues were fairly presented to the jury and see no justification for disturbing the verdict, which is accordingly affirmed.

AFFIRMED.

March Term, 1912, No.

269 - 18309

N. M. INGHAM doing business as N. M. INGHAM & CO., Defendant in Error,

vs.

MERCHANTS LITHOGRAPHING COMPANY, Plaintiff in Error.

184 I.A. 77

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is a writ of error brought to reverse a judgment of the Municipal Court of Chicago for $306.13 in favor of the defendant in error, Nettie M. Ingham (doing business as N. M. Ingham & Co.) and against the plaintiff in error, Merchants Lithographing Company. The defendant in error was plaintiff below and sued for the price of certain paper sold by her under the style of N. M. Ingham & Company to the defendant corporation. Her bill as shown by her statement of claim was made up as follows:

$4.20 Balance on a sale of Dec. 3, 1909.

$49.93 for 1580 sheets of white eggshell paper at $1.60 per thousand on a sale of Oct. 21, 1910.

$256.20 for 7000 sheets of Post Card paper at $36.60 per thousand on a sale of Dec. 2, 1910.

The item of $4.20 was waived or conceded by the plaintiff on the trial, but the items of $49.93 and $256.20 were insisted on. They aggregated $306.13, for which judgment was rendered by the trial Judge, who tried the case without a jury.

There was no question about the delivery of the paper charged for or its agreed price, but the defence was a counter claim or set off. This counter claim was that the item of $49.93 was for paper which was warranted by the plaintiff to

be of such a character that it could be run and used on offset presses, but which turned out not to be of that character, and that on October 14, 1910, a week before the delivery of the paper constituting the $49.95 item, there was delivered to defendant by the plaintiff 6254 sheets of the same character of paper (white eggshell art cardboard) at the same price ($31.50) per thousand, and that this paper was similarly warranted and proved similarly inferior to the warranty. The defendant had paid for this last mentioned paper $206.16, and now claimed to be reimbursed to that amount. It also claimed -

"That at the special instance and request of the plaintiff the defendant company did, after delivering the inferior quality of said paper, and that it could not be used on the said offset presses, go to further expense and trouble in attempting to use up said paper and thereby relieve the plaintiff from total loss of the said material, and that by reason of said further endeavors to use up the said paper defendant company was put to a great amount of expense, to-wit, 5 1/2 days of press work at $20 ($110) and 3 large transfers at $5 each ($40). Total $150."

The aggregate of these sums this claimed in set off was $406.09, which set off against the plaintiff's claim of $306.13 would leave the plaintiff indebted to the defendant in the sum of $99.96, for which judgment in its favor should, defendant maintains, have been rendered instead of the judgment against it for $306.13.

The plaintiff alleged in answer to this claim of set off, that the paper delivered was not warranted to be suitable to be run and used on offset presses, and was of good quality; that she did not authorize the defendant to use said stock as stated in said claim of set off; that defendant had destroyed said stock by printing one side before notifying plaintiff that it was unsatisfactory to it, and thereby made it impossible to return said stock.

The court found the questions of fact involved in

this case - whether there was any warranty of the character of the paper in the sales of October 14th and October 21st, 1910, and a failure of such warranty - against the defendant, and we do not see any reason for reversing his finding.

The goods described in the set off were not manufactured by the plaintiff for the defendant, but sold to it by sample, and we see no evidence that the bulk delivered was not equal to the sample.

As to the implied warranty claimed of the adequacy of the paper for the use designed, there is nothing to show that the plaintiff or her salesman was better qualified to judge of the particular fitness of the paper for it than was the buyer, who was the representative of the defendant. Moreover there were questions of fact whether the plaintiff's representative or the plaintiff knew that the paper was bought for the purpose of printing on offset presses, - and even whether it was sufficiently proved that it was not reasonably fit for that purpose.

As to the express warranty contended for, it was denied and there was a direct conflict of evidence on the subject, on which the correspondence and subsequent conduct of the parties were to be taken into account.

We do not think we should be justified in disturbing this judgment and it is affirmed.

AFFIRMED.

289 - 18329

MAX GITTELSON et al.,
Plaintiffs in Error,

vs.

FANNIE REICHMAN et al.,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

184 I.A. 96

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The judgment of nil capiat and for costs in this case against the plaintiffs must be reversed and the cause remanded to the Municipal Court. The suit was for brokery commissions on a sale or exchange of real estate. The jury were instructed to find for the defendants. This was error, because the plaintiffs, in our opinion, made out a prima facie case, and it was not defeated, as the defendants contended and the court ruled, by the introduction of a decree in a cause in equity to which the plaintiffs were not parties, nor by which, do we think, as defendants maintain, they were bound because in privity with or represented by the actual parties.

It is not necessary nor within our legitimate function to pass herein on any other question concerning the rights of the parties. The decree was inadmissible unless other evidence than that produced in this case so connected the plaintiffs with it as to make it binding on them.

If the facts which led to the decree in chancery between other parties were sufficient to bar the plaintiffs from recovery, concerning which we express no opinion, they should have been proved as a defence in this case.

The judgment is reversed and the cause remanded to the Municipal Court.

REVERSED AND REMANDED.

ALFRED A. HALLGREN,
Appellee,

vs.

JOHN E. COWLES et al.,
Appellants.

Appeal from
Circuit Court,
Cook County.

184 I.A. 17

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a petition for a mechanic's lien, filed by Hallgren, the complainant, against John E. Cowles and George M. Groves, owners of an apartment building, constructed for them by the complainant. Other defendants to the petition were the trustee in a trust deed conveying the property, and the unknown owners of notes secured thereby. Answers and replications being filed, the cause was referred to a master in chancery, who after taking proof reported, recommending a lien for $4,300 with costs. Exceptions to the report were overruled by the court, and a decree entered in accordance with the recommendations of the master, from which decree the defendants who own the premises have appealed.

That the complainant performed the work for which he claims a lien does not seem to be disputed, but defendants claim that the building was not completed within the time stipulated in the contract, which was August 1, 1910, and also that no architect's certificate for final payment was ever issued, as is said to be required by the contract before the final payment would become due.

The master reported on the question of delay substantially as follows: that the complainant had the excavation for the building almost completed and had hauled considerable iron and other material on the ground, when it was agreed in writing, on January 14, 1910, that the commencement of the work should be

308 - 18848

JOHN E. DOWNES et al.,
Appellants.

MR. JUSTICE MONTGOMERY DELIVERED THE OPINION OF THE COURT.

postponed until the following year, it being provided that the work should not be taken up earlier than March and should be completed by August 1, 1910; that the work was resumed in the latter part of March, 1910, and continued from that time until it was completed; that after the work was well along it was stopped by the city authorities on account of the building, as planned, not leaving sufficient space at the rear of the lot, and new plans had to be made and approved by the building department of the city before the work could progress; that the arrangement of partitions, closets and bookcases was changed frequently at the order of the owner of the property, entailing much delay; that the decorating was delayed in order that the individual tenants might select their own decorations; that the carpenters completed their work on September 22, 1910; that the building was completed before the first day of October, 1910. These findings were also included in the decree.

After giving consideration to the evidence, which it is unnecessary to recite in detail, we are of the opinion that these findings of fact were abundantly supported by the testimony in the case.

The claim that the delay in completing the building was occasioned in part only by the owner or the architect is not supported by the evidence. It clearly appears that the owner Cowles was constantly changing and rechanging the work, and that this caused the delay, and that the decorating was postponed at his request so that the tenants might select what they desired. The chancellor held that the complainant could not be held accountable for any damage, if damage there was, caused by the completion of the contract being postponed beyond the first day of August, 1910; and this conclusion is justified by the evidence.

It is urged that the contractor is liable for the rental value of the premises for the months of August and September, 1910, this being the period of delay in completing the building after the contract date of August 1st. If, as we have held, the con-

tractor was not responsible for this delay, he cannot be held for any loss of rent during this period; and furthermore, the evidence was that the ordinary renting seasons in Chicago commence on May 1 and October 1, and that it is customary in renting flats in August or September to give concessions in the matter of rent to October 1st. We see no reason to disagree with the conclusion of the court that no substantial loss in the rental value of the premises resulted by reason of the building not being completed by August 1st.

It is urged that where a contract provides that payment to the contractor is to be made only on the certificate of the architect, the contractor is not entitled to a lien except such certificate has been issued, unless it can be shown that it is withheld by the fraud of the architect. It would be a sufficient answer to this claim for us to say that in the abstract of the contract made by appellants there is no such provision as is claimed with reference to the time of payment. As abstracted, it appears only that the parties made a contract dated November 30, 1909, for the construction of a building to be completed on or before April 1, 1910. If appellants wished to rely on the terms of the contract they should have caused such provisions to appear in the proper place in the abstract of record. We cannot search the record to discover reasons for reversing the judgment. However, we find in the testimony that the complainant requested from the architect a certificate for the final payment, which, for some reason that does not appear, was not given to him.

It is said that the decree must be reversed for the reason that no default was entered against the defendants described as the unknown holders and owners of the notes secured by the trust deed above referred to, and that in any event it was error for the trial court to fail in fixing the rights of these parties in the decree.

In Geffinger v. Klewer, 227 Ill. 598 (601), the court

said: "It further appears that certain parties defendant made no answer and no order of default was entered against them. Appellant assigns this as error. The defendants referred to are not parties to this appeal and have no consideration here. Their situation and interest in no way affect the rights of this appellant and cannot be successfully urged by him as grounds for reversal." See also Portones v. Badenoch, 132 Ill. 377.

Other points are presented, which have received our consideration but are not of sufficient importance to justify a reversal.

Concluding as we do, that the decree of the chancellor was in accordance with justice and equity, it will not be disturbed but will be affirmed.

AFFIRMED.

Marion Horn, 1912, Ill.

306 - 18346

184 I.A. 89

ANNIE DUNNE,
Appellee,

vs.

FRANK BERNARDY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Annie Dunne, hereinafter called plaintiff, brought suit against Frank Bernardy, hereinafter called defendant, in trespass on case. The jury returned a verdict awarding her $150 for damages, and judgment was entered thereon, which defendant asks this court to reverse.

To support her declaration plaintiff introduced testimony tending to show that during an altercation between the defendant and the plaintiff's husband, in which plaintiff was attempting to be a peacemaker, the defendant spit tobacco juice in her face and upon her clothes. This is the story of the plaintiff and in substance of six other eye witnesses.

The defendant admits the altercation with plaintiff's husband but denies that he spit on plaintiff, and in this he is corroborated by three other eye witnesses, and the testimony of two other witnesses, who say that after the alleged occurrence they saw no tobacco spit on the plaintiff.

In this state of the testimony it was peculiarly for the jury to determine which story was to be believed, and from our examination of the record we are unable to say that the conclusion of the jury to credit plaintiff's version of the affair is not warranted by the evidence.

Complaint is made of the inflammatory remarks of the attorney for plaintiff in his speech to the jury. The remarks, which appear at some length in the abstract, are highly improper, and would justify a reversal if it was not manifest that their intemperance worked rather to the disadvantage of the plaintiff than to the defendant. The ad damnum in plaintiff's declaration was $5,000, and among other things plaintiff's attorney told the jury that this amount was "not too much." The amount of the verdict, $150, indicates that the jury was not influenced to the prejudice of the defendant by anything said by plaintiff's attorney, and therefore a reversal would not be justified. City of Salem v. Webster, 192 Ill. 369.

Nearly all of the witnesses testifying upon the trial were related to each other, and the disturbance in question followed a verdict favorable to one branch of the family in a family disagreement which had been carried into the courts. This may have influenced the jury in returning such a small verdict.

Seeing no reason to disturb the verdict, and there being no reversible errors upon the trial, the judgment will be affirmed.

AFFIRMED.

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Gen. No. 8. Oct. Term, 1912- Agenda No. 5-

Filed April 18, 1913-

W.F.Potter.,

Plaintiff in Error-

VS. ; Error to Sangamon.

S.A.Gibson. , A.C.Gibson,

G.A.Gibson, J.Francis Miller,

Illinois National Bank and

H. Merriam.,

Defendants in Error-

184 I.A. 112

Philbrick, J.-

This is an action on the case originally brought by plaintiff against S.A.Gibson, A.C.Gibson, A C.A.Gibson, J.Francis Miller, Illinois National Bank and H. Merriam.Trial below resulted in a verdict finding the Illinois National Bank, H. Merriam and J. Francis Miller, not guilty under direction of the court. The jury failed to agree as to the guilt of the Gibsons. After a motion for a new trial had been denied as to J.Francis Miller, the Illinois National Bank and H. Merriam, plaintiff dismissed his cause of action as a ainst the Gibsons. Judgment was rendered on the verdict in favor of Miller, the Illinois National Bank and Merriam; plaintiff in error prosecutes this writ of error to reverse that judgment.

S.A.Gibson, A.C.Gibson and G.A.Gibson, owned the capital stock of the Gibson Gear Manufacturing Company, a corporation. They were engaged in business in the city of Springfield, and did their banking business with the Illinois National Bank. Plaintiff in error a number of years ago had been acquainted with the Gibsons in Ohio, the acquaintance was renewed upon a visit to Springfield, he visited and inspected their manufacturing plant, and the Gibsons invited him to purchase of them certain stock held by them in the Gibson Gear Manufacturing Company. Plaintiff in error insists that he knew nothing of the business affairs of the Gibson Gear Manufac-

turing Company and was referred by the Gibsons to the Illinois National Bank for the purpose of ascertaining its financial standing and the general character and prospects of the business of the corporation, and that in pursuance of the reference so given him he went to the Illinois National Bank, interviewed its officers and was informed by them that the Gibson Gear Manufacturing Company was a prosperous concern, always made good with them and was considered by them as a good and profitable investment; that the bank informed him that the Gibsons were indebted to it in the sum of Four Thousand Dollars upon notes; and he further insists that after making this investigation of the Gibson Gear Manufacturing Company, and upon the statements made by the Gibsons, that if he would invest five thousand dollars in their business they could pay off all their outstanding indebtedness, being the four thousand in notes held by the Illinois National Bank, and would have one thousand dollars left with which to transact their business, and that they were in need of ready money for that purpose. That, relying upon the pepresentations of the Gibsons and the statements made by the bank, plaintiff knowing nothing of the condition of the corporation other than that obtained from these sources, and relying upon the same, disposed of a mortgage held by him to raise the amount necessary, and made the investment, that the representations were false and fraudulent and the parties knew them to be such. That instead of being indebted to the bank in notes to the amount of four thousand dollars, there was in addition to the four thousand dollar note between five and six thousand dollars overdraft at that time of which he was not informed, that other indebtedness existed which rendered the corporation insolvent, that the statements were all untrue, false and fraudulent and known to be so by the parties making them, and relying upon them he invested five thousand dollars in the corporation, and that within a few months thereafter it was declared bankrupt, whereby and by reason of the premises he lost his money.

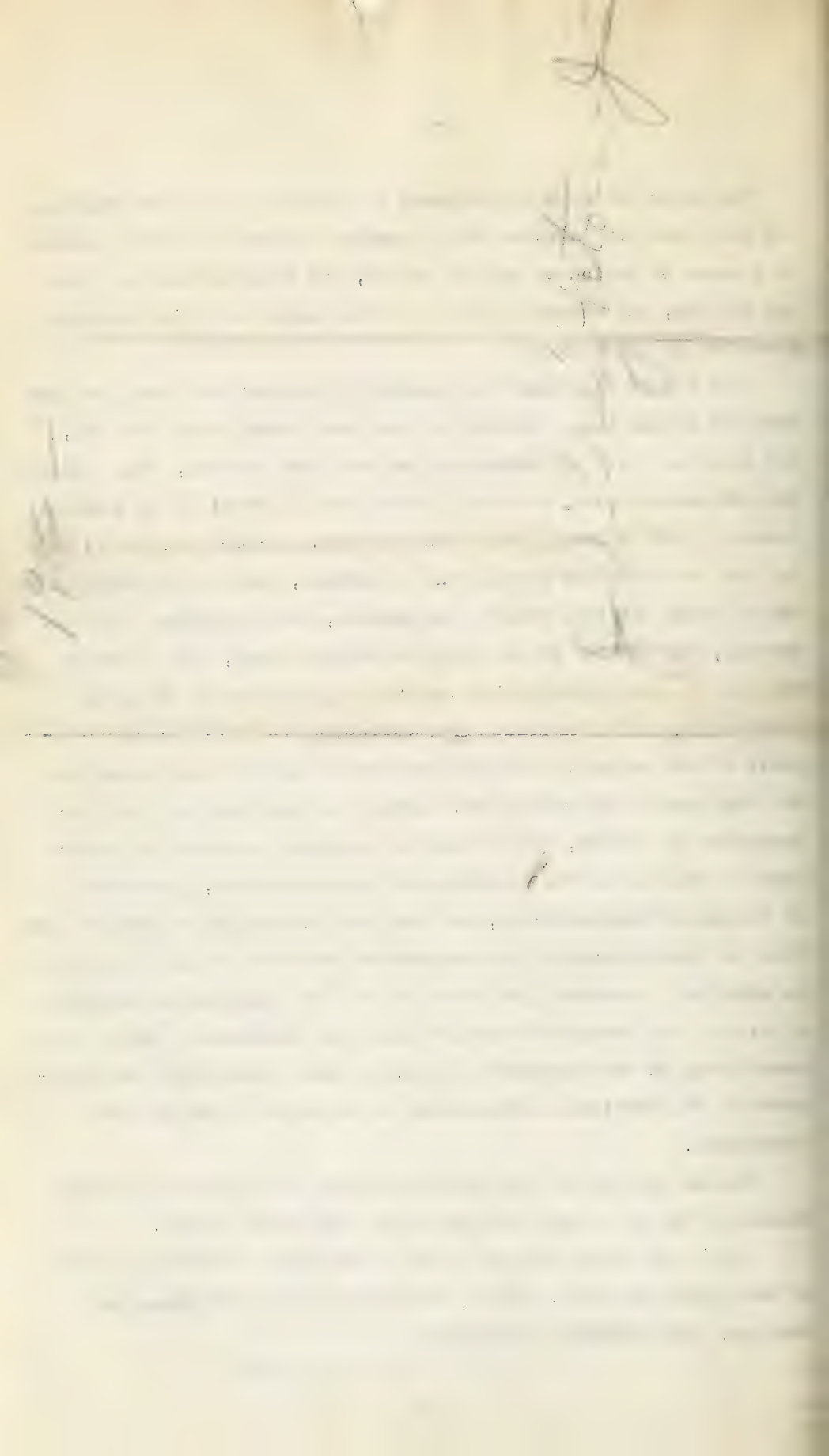
The cause having been dismissed by plaintiff as to the Gibsons, the only question involved now is whether or not the record discloses a cause of action as against Miller, The Illinois National Bank and Merriam, and whether or not the trial court erred in directing a verdict in their favor.

The record discloses that plaintiff in error had known the Gibsons for a long time, belonged to the same church which they did, and upon his visit to Springfield he met these parties, they renewed the old acquaintance, and they invited him to invest in the capital stock of their company, that upon representations and statements made by them he determined to make the investment, that he was referred to the Illinois National Bank by the Gibsons, that he called upon Mr. Merriam, the cashier of the Illinois National Bank, and informed him that he was contemplating making an investment in the stock of this company and talked with him concerning the condition and prospects of the company. The most that can be said of the statements and representations made by Mr. Merriam is that they were mere expressions of opinion, that he made no positive statements to plaintiff in error as to the condition of the corporation, its worth or financial responsibility, and that the information he obtained from the bank regarding this corporation was after he had determined to make the investment and after he notified them that he had made a raise of the money with which to make the investment. Under these conditions, it was impossible for him to have relied upon the statements of Mr. Marriam in determining the question of making the investment.

Having arrived at this conclusion from this record, it is unnecessary for us to pass upon any other questions raised.

The trial court did not error in directing a verdict in favor of defendants in error, Miller, the Illinois National Bank, and Merriam. The judgment is affirmed.

A F F I R M E D.



184 I.A. 163

6013-

April Term, 1915- Agenda No. 6-

Filed Oct. 16, 1915-

Servian J. Kauffman.,
Appellee.,

VS.

David G. Sanner.,
Appellant.,

; Appeal from County Court of Shelby.

Opinion, Creighton, J.

This was a suit commenced before a justice of the peace to recover a balance claimed to be due upon a tiling contract. Judgment was rendered by the justice in favor of the appellee, in the sum of $132., and costs of suit. Appellant appealed from such judgment, to the County Court of Shelby County, where the cause was again tried, by the court and a jury, and a verdict and judgment in favor of appellee ~~and~~ ~~xxx~~ and against appellant, in the sum of $117.92-, and costs of suit, was rendered.

From this judgment an appeal has been perfected by the appellant, thus bringing the record before us for ~~xxxxxx~~ review.

The question in controversy in the cause, grew out of a contract for tiling certain lands of the appellant, and said contract is as follows;-

This agreement made and entered into this 7th- day of December, A.D. 1910, at Findlay, Illinois, by and between Servian J. Kauffman, of Arthur, Illinois, party of the first part, and David G. Sanner, of Bethany, Illinois, party of the second part, witnesseth: That for and in consideration of the agreements of the second party hereinafter contained, to be kept and performed by him, the said first party agrees to dig and lay tile on the farm of the second party, located in section twenty-five, township thirteen, range 3 east of the 3rd. P.M., Shelby county, Illinois, at the following rates: Eight inch tile at 12 c. per rod for eachfoot in depth; six inch tile at 10c. per rod for each foot in depth; five inch tile at 10c. per rod for each foot in depth;

on the 5 and 6 inch tile above price to apply up to and including a depth of three feet, and xx 1c. per rod per inch above 3 feet in depth; all work to be done in a satisfactory manner, and as soon as the weather and other conditions beyond control will permit.

In consideration of the hereinbefore agreements of the first party to be kept and performed by him, the said second party agrees to pay to the first party as follows: As fast as ditch is dug to the extent of 100 rods the same is to be inspected and if satisfactory accepted and a payment of 75 per cent of the amount due on said ditch is to be paid, when all of said ditch is completed and accepted the balance remaining is to be paid. Party of the second part to furnish feed and barn room for first party's teams and to furnish a convenient spot of land close to water without charge.

It is further specifically understood and agreed by and between the parties hereto that ..... and that all the benefits and agreements herein contained shall inure to and be binding on the heirs, executors, administrators and assigns of both parties.

In witness," etc .

After the written contract above quoted was entered into, some changes were made by oral agreement, and this controversy is largely due to xhx such changes.

Upon the question of fact submitted to the jury we are inclined to the opinion that the appellee's contention is supported by a fair preponderance of the evidence, and that the verdict and judgment in this case are right and just.

Objection is made by the appellant to certain instructions, two of which were modified by the court and given on the part of appellant, and one which was given at the request of the appellee.

While it is true that these instructions are open to criticism, we do not think they had an undue influence upon the minds of the jury. The jury seems to have reached a correct conclusion from all of the evidence, and the judgment of the court was properly rendered.

Courts will not reverse a cause merely because of some irregularity during the trial, if from all of the facts and circumstances

in the record it can be seen that equal and exact justice has been done.

Believing that no prejudicial error was committed by the court in the trial of the cause, and believing that justice has been done, the judgment appealed from must be and is affirmed.

A F F I R M E D.

Yours truly,

Geo. Whittaker, Esq.

6019 April 1913.

Alva J. Hendricks, Appellee,
vs.
William F. Roley, Appellant,

Appeal from Shelby.

Opinion, CRIGHTON, J.

184 I.A. 164

This was a suit brought by appellee against appellant to recover $500 designated as liquidated damages due, and the value of certain personal property turned over to appellant under a written contract for the exchange of real estate and personal property.

The declaration contained one count, with the common counts, and this count, is, in substance, as follows: that on the 22nd day of August, 1910, the appellant entered into a contract with plaintiff, to-wit:

"This agreement, entered into by and between W. F. Roley as party of the first part, and A. J. Hendricks, as party of the second part, witnesseth, that the said party of the first part has this day bargained and sold, and by these presents does bargain, sell and agree to convey by a good and sufficient deed within ten days from the date hereof, the following real estate in Clay County, State of Illinois, to-wit: 255 acres of land being all the land owned by him in that county at the present date, land incumbered to the extent of $8000, plus interest from Jan. 10, 1910, on the $8000.00. It is hereby agreed that said party of the second part is to pay to said party of the first part as the purchase price of said real estate, the following property: 107 acres of land in Okaw Tp., together with the following: 8 buggies, one surrey, 1 wagon, 2 sets double harness, 5 sets single harness, 1 clipper, two collars, office fixtures, etc., six horses and $300.00 in cash and one bay stallion and feed in barn.

Said party of the first part reserves the following crops growing on said real estate. All crops growing on it this season. Possession of the real estate to be given immediately. Deeds to be made and delivered on or before the first day of September, 1910. Said party of the first part hereby agrees to furnish said party of the second part an abstract of title showing perfect title thereto; as does also party of the second part to pary of the first part. Should said abstracts show perfect title said purchase price is to be paid in the manner aforesaid. Should abstracts not show perfect title parties are granted two months in which to perfect same. Should the abstracts disclose a title so defective that same cannot be made perfect, then this contract shall be void and any and all sums of money paid hereunder shall be repaid to the party of the second part. Should either party to this contract fail, neglect or refuse to comply with each and every material agreement herein contained on his part to be performed, the party so in default shall forfeit and pay over to the party not in default as liquidated damages the sum of Five Hundred Dollars, which has been put up this day by each party as forfeit money in the hands of F. J. Snapp."

And plaintiff avers that in pursuance of said contract he then and there delivered the immediate possession of the personal property and the 107 acres of land described in the contract, to the appellant, but that appellant failed and refused to deliver possession of the 235 acres of land lying in Clay county, as provided in said contract, or to execute and deliver a warranty deed or furnish a perfect abstract of title to the same, and because of said failure the appellant became liable to pay to the appellee the said sum of $500., forfeit money provided in said contract, and by means whereof the appellant

also became liable to pay to the appellee the value of the personal property which he received of the appellee under the said contract, of the value of $1,500.

A plea of the general issue and two special pleas were filed by appellant.

A trial was had before the court and a jury, and a verdict and judgment in favor of appellee was entered, in the sum of $940, and costs of suit, and thereupon the appellant prayed was granted and perfected this appeal, bringing the record before this court for review.

Appellee contends that under the terms of the contract here involved, the appellant was to make and deliver his a warranty deed and an abstract showing the title to the land to be free and clear of all incumbrances, and cites a long list of authorities in support of his position. We cannot agree with this contention, in this respect. The contract entered into between the parties, while somewhat vague, when construed together with all of the evidence in this record, clearly shows to our minds, that appellee was to take the 235 acres of land subject to an incumbrance of $8,000, together with the accumulated interest thereon. In other words, the $8,000 incumbrance was a part of the purchase price which appellee, under his contract, agreed to pay for the lands in question.

On the other hand, appellant contends that recovery cannot be had against him for the reason appellee did not comply with the terms of his contract, and therefore appellant has the legal right to retain all of the personal property delivered to him as part payment of the purchase price of his farm, and cites a long list of authorities in favor of his contention.

Whatever may be said as to the rule of law announced in said authorities, the same are not applicable to the questions raised on the record in this case. Here appellant

contracted to furnish appellee a warranty deed and an abstract showing perfect title and to give immediate possession the 235 acres of land in question, in consideration that he received the personal property as a part of the purchase price. Appellant failed to show a perfect title to the land by his abstract. His first effort, so far as this record shows, did not show any patent from the United States as to this land. This abstract was submitted to appellee and specific objections were filed thereto, among which special attention was called to unsatisfied mortgages which aggregated much more than the $8,000, specified in the contract, together with other objections, and the abstract was returned to appellant. Sometime afterward, possibly within the time specified in the contract, appellant claims that he returned the abstract to Keller & Leathers office, the place designated for the deposit of the deeds and abstracts, for examination.

Appellee contends that he did not see or hear of the abstract after the first time he returned it to appellant. Whether he did or not, it is evident from the record here, that at the time the corrected abstract was claimed to have been returned, there yet remained of record unsatisfied mortgages amounting to 9500-00 while the contract recites the encumbrance as 8000.- with accrued interest:

It is contended by appellant that this excess of $1500, on the had been paid by him, although not satisfied of record. This, undoubtedly was true, as disclosed at the trial of this cause, but we fail to find that this fact appeared in either of the abstracts, or was made known to appellee before the beginning of this suit.

The record fails to show that any deed was ever made or delivered to appellee by appellant to this land, as was

required by the contract. One who seeks to invoke the rule announced by appellant, above referred to, must first offer to comply in full with his part of the contract. This appellant did not do.

Appellant contends further, that appellee failed to give him possession of the 107 acres of land, and that he failed to deliver the deed to the same. In this contention appellant is mistaken, because the evidence of the appellant himself, in this record, shows that he admitted that appellee came to him several days after the personal property had been delivered to appellant, and asked and obtained leave from appellant for his, appellee's, stock to remain in the venture on the said farm for a short time. Each of these parties at that time, we assume, considered the deal would be completed in all respects. So far as appellee is concerned it is evident he regarded the title to his land had passed to appellant, otherwise he would not have asked appellant's permission to allow his stock to remain upon the farm.

Within two or three days after the contract in question had been signed, appellee delivered over to appellant the personal property described in said contract, and also the possession of his farm. So far as the title to appellee's farm is concerned, this record does not disclose there was any complaint. Immediately after turning over the farm and the personal property to appellant, appellee went to Clay County to look after the farm he was to receive, and found a tenant upon the same who refused to give possession, and who claimed his lease had not expired. Appellant contends that the clause in the contract of exchange which reserved to himself the growing crops, annuls the other clause in the contract which provides for the immediate possession.

We do not understand that to be the law. When two clauses in a contract are antagonistic in part only, they should be enforced in such parts as are not in conflict. The reservation of the growing crops gave appellant the right to such portions of the farm as then had growing crops thereon, for the purpose of harvesting and removing such crops. Appellant's rights on that farm, under the terms of the contract, were for the purposes of ingress and egress to look after, harvest and remove the crops and that only. The residue and all other parts of the farm, under the terms of this contract, if it had been carried out, would have gone immediately to appellee.

Appellant, failing to comply with his portion of the contract, is in no condition to insist upon a forfeiture by appellee of the partial payment made by him by the delivery of the personal property.

This declaration seeks to recover for the value of the stock turned over to appellant and for the forfeiture of $500, as provided by the contract. There is no proof in this record upon which to base a verdict for the forfeiture of $500 and we assume that the court below so held, as no complaint is here made as to that item.

The personal property delivered by appellee to the appellant consisted of seven head of horses, eight buggys, one surrey, seven sets of harness, office fixtures and feed in the barn. A number of witnesses expressed their opinions on the witness stand as to the value of the property, and the proof is abundant to sustain the value thereof as fixed by the verdict of the jury and the judgment of the court.

Appellant advertised and sold a portion of this property in the town of Findlay, where it was located, upon short notice, and received a smaller amount than some witnesses

fixed as the value of the property sold. He, however, took away with him, and did not sell, four of the horses, one of which was a stallion estimated to be worth about $365. Besides these, appellant took other property of some considerable value. From the whole evidence we conclude the judgment herein is not excessive, and that the property was clearly shown to be of that value. This property was retained and converted to the use and benefit of the appellant wrongfully, and he is liable for the value thereof.

A careful examination of the instructions complained of leads us to believe that no substantial error was committed by the court in passing upon them.

Finding no reversible error in this record, and believing that substantial justice has been done, the judgment is affirmed.

JUDGMENT AFFIRMED.

Fig. 3. The Drive

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Abstract 1913 R. H. Reversed

6039. April Term, 1913. Agenda No. 62.

Filed Oct. 16, 1913.

Mike Polonious, minor, etc.
Appellee.,

vs. ; APPEAL FROM MACOUPIN.

The National Bank of Benld,
Appellant.,

184 I.A. 184

Opinion, Creighton, J.-

This was a suit begun in the Circuit Court of Macoupin County by the appellee, by next friend, against the appellant. The declaration as finally amended, contained one count, and, in substance, alleges that appellant left a radiator standing outside of its bank building on the sidewalk, parallel with the building, and permitted the same to remain there for a long space of time; that said radiator weighed about one thousand pounds, stood on four feet about nine inches apart one way and four feet apart the other, and that said radiator was left standing in an unsafe condition; that the plaintiff, appellee here, was a child of tender years, to-wit; of the age of fourteen years, and without ability, because of his age, to exercise ordinary care for his own safety; that appellee went up to the said radiator and pushed or rocked it and it fell over on him and hurt his leg, etc.

Pleas of the general issue was filed and issue joined. The cause was heard by the court and a jury, and a verdict and judgment in favor of appellee in the sum of $5,000. and costs was awarded, and an appeal was perfected to this court.

The material facts may be stated as follows;- The appellant is a National Bank, and was occupying a brick building in the Village of Benld, fronting south on the Main street thereof, which had a cement walk running east and west and a side street, with cement walk, running north and south; that the walk adjoined the building on the east and extended out in the street about nine feet , with the usual slope to the street. The bank was making some changes in the interior of its building and had employed carpenters for that purpose, and

was also changing the plumbing and heating arrangements, and contracted this work to the Benld Hardware Company for the sum of $88. Under their contract the Hardware Company removed the radiator in question and placed it out on the sidewalk on the east side of the building, near the building, in an upright position, where it had remained for from three to four weeks. The radiator was about three feet high and four feet long and weighed about five or six hundred pounds. While in this position appellee, who was above the age of fourteen years, chanced to pass that way and gave the radiator a push and rocked it back and then forward and it fell toward him and caught and broke one of his legs, and the break or the unskillful treatment and setting of the limb, caused a permanent injury. The appellee was mentally and physically an average boy of his age. He had attended school during the school year and, at the time, was taking work in both the seventh and eighth grades, and according to the evidence of his teachers, was well up with his classes. He had been a resident of the village for five years and knew every business house and street in the village and engaged in the games at school, fished, swam and, in fact, took the part of a fourteen or fifteen year old boy in the amusements of the village.

The vital question raised by this record is, was the appellee of such tender years as to render him incapable of knowing and realising the danger arising from his act at the time of his injury, and to excuse him from the exercise of reasonable care for his own safety?

It is earnestly contended by appellee that there is no presumption of capacity to know and avoid danger in the case of a child of fourteen, but that his capacity is to be determined by the jury from all of the facts and circumstances in the case.

Granting this to be the rule of law, the question of the liability of the appellant in this case, does not turn upon the age

alone, but upon whether under all of the evidence, this boy, at fourteen years of age was capable of realizing the probable consequences of his act at the time and before the injury. The uncontradicted evidence in this record shows that appellee was a healthy, bright, energetic boy; that he engaged in all of the sports and amusements of the village; that he fished, swam, and worked about his home, as required by his parents; that he attended school regularly and understood and recited his lessons well and was, at the time of his injury, taking work in both the seventh and eighth grades of the school and was fully up with his classes that he was familiar with every business house in the village and had travelled on the rail road trains and the trolley lines.

This evidence discloses to our minds that fact that the appellee, who was fourteen years of age, had as much or more experience, education, intellect and general knowledge , than the average fourteen year old boy. Appellee's act in pushing the radiator was due either to mischief or unthoughtedness. Therefore, we cannot agree with the contention on the part of the appellee that the accident was due to his tender years or lack of knowledge.

It is urged on behalf of appellee that it is the province of the jury to pass upon appellee's ability to know and understand the probable consequences of his act. That may be admitted, as a general rule, but the duty of this court, in reviewing the record on appeal, is to pass upon questions of fact where the evidence is clear and undisputed as well as questions of law, and to determine from all of the evidence whether the jury was justified in reaching a given conclusion.

In this case it was a duty imposed upon the plaintiff, appellee, by the law of our State, to make out his case by a fair preponderance of the evidence. If he failed so to do, he should not have recovered the judgment.

In our judgment he completely failed to show any fact or circumstance which in any way leads to the conclusion that he was not

of sufficient age, experience and intelligence to understand the probable consequences of his act at the time he received the injury complained of.

Therefore, the judgment appealed from is reversed.

R E V E R S E D.

Finding of fact: We find , as a fact, that appellee was capable of knowing and understanding the consequences of his own act at the time of receiving his injury, and he was injured in consequence of his own negligence.

Farmer & Creighton

1913

184 A 185

6040- April Term, 1913- Agenda No. 26-

Filed - Oct - 16 - 1913 -

James Burbridge,
Appellant.,

VS. ; Appeal from Macon.

John A. Howard, et al.,
Appellees.

184 I.A. 185

Opinion, Creighton, J.

This was an action of debt begun in the Circuit Court of Macon county by the appellant, against the appellees, to recover upon an attachment bond. A trial was had in said court, and at the close of the evidence the court gave a peremptory instruction, directing the jury to find the issues for the appellees, and judgment was rendered in favor of appellees and against appellant, for costs. This is an appeal bringing the record before us for review.

The material facts in the case may be stated as follows: Appellant resides in Pittsfield, Illinois, and was a hay dealer. He contracted to sell two car loads of hay to the appellees, of Decatur, Illinois, and shipped the hay and drew upon the appellees for the purchase price of such hay, through a bank at Decatur. The draft was not honored, and appellant then consigned the two car loads of hay to Walter N. Tobeman, at East St. Louis. At this time the hay was in the yards of the Wabash Railroad Company, at Decatur, and upon being advised that the hay had been, by appellant ordered forwarded to East St. Louis, the appellees commenced a suit in attachment and at the same time filed with the Clerk of the Court an affidavit, gave the bond in question, and secured an attachment writ to issue against the appellant, which said writ commanded the officer to summon the Wabash Railroad Company as garnishee, which was accordingly done. At the time of the service of the said garnishee of the said Railroad company, the two car loads of hay were in the possession of the said railroad company on their side-tracks at Decatur, and while in its custody about one-half car load of the hay was removed. Appellant was required to pay damages to the garnishee, attorney's fees and other expenses incident to the defense

of the attachment suit.

Appellees contend that in as much as the attachment writ was not served upon appellant and no levy was made upon the property, the appellant has no standing in court in a suit upon the attachment bond, notwithstanding the fact that the appellees failed as in their attachment suit.

The conditions of the bond sued upon, provides, that whereas, the appellees have prayed an attachment suit against the estate of the appellant, and then provides, that if the appellees "shall prosecute their suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said James Burbridge all such cost in said suit and such damages as shall be awarded against "appellees, "in any suit or suits thereafter to be brought for wrongfully suing out said attachment"., then the bond to be null and void, etc.

It is admitted in this record that appellees did not prosecute their suit with effect, but the same was dismissed by the court at their cost. Therefore the conditions of the bond became forfeited, and this suit was accordingly brought to recover damages, as provided in the bond.

Under any view that may be taken of this case, at least nominal damages should have been awarded the appellant. We refrain from discussing the amount and measure of the damages claimed in the suit, because of the garnishment and attachment proceedings, for the reason the judgment must be reversed on other grounds.

One error assigned by the appellant is that the court erred in refusing to permit appellant to amend the declaration at the time of the trial of the cause. Section 58 of Chapter 110, entitled "Practice", provides, that at any time before final judgment, in any civil suit, amendments may be made on such terms as may be just and reasonable, to enable the plaintiff to sustain his cause of action, or the defendant to make defense.

It is contended that the power to grant leave to amend pleadings is within the discretion of the court. That, in a measure, may be conceded to be true, but the discretion, in all cases, must be reasonably exercised. As was said by our Supreme Court in Bemis vs. Homer, 145 Ill., 567: "It is the policy of our statute allowing amendments, that neither party to an action shall be deprived of a substantial right through defects or omissions in pleadings, or, as was said by the same court in Misch vs. McAlpine, 78 Ill., 507; "Such amendments, however, are to be allowed upon such terms as are just and reasonable within the discretion of the court. But, such terms, in the language of the statute, must be "just and reasonable," and not so onerous as would practically amount to deprivation of the rights secured by the statute".

We are of the opinion that the court should have allowed the amendment to have been made to the declaration, as asked by appellant.

The action of the court in giving to the jury the peremptory instruction to find the issues for the appellees was error.

The judgment will be, for the reason indicated, reversed, and the cause will be remanded.

Reversed and Remanded.

Mr. Speaker —

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6044- April Term, 1913- Agenda No. 29-

Mike Metas.,
Appellee-

Filed Oct. 16, 1913-

VS. ; Appeal from Vermilion.

Peter Sanichas.,
Appellant.,

184 I.A. 186

Opinion, Creighton, J.-

This was a suit commenced by the appellee against the appellant, in the circuit court of Vermilion county, to recover a certain sum of money claimed to be due.

The declaration contained one count, and, in substance, is as follows: that on the 27th day of September, 1911, at Danville, in the said County and State, one George Charley was indebted to the appellee in the sum of $44: that he had brought suit in attachment against the said George Charley and garnisheed the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which was, at the time indebted to the said George Charley in the sum of $59., and afterwards, on the 14th day of October, 1911, appellant falsely and fraudulently agreed with the said George Charley to settle and compromise the claim of appellee in full, for the sum of $15., and falsely and fraudulently represented himself as the authorized agent of the appellee, and received the said sum and receipted for the same in the name of ~~xxx~~ appellee; that appellee has been put to great expense in and about his effort to collect the ~~xxx~~ said sum, to the damage of the appellee in the sum of $100.

A plea of the general issue was filed, and the cause was tried by the court and a jury, and a verdict returned finding in favor of appellee in the sum of $67.75. A motion for new trial was overruled and a judgment entered upon the verdict. Exception was duly taken, and this appeal perfected.

Many errors are assigned as ground for the reversal of the judgment herein rendered.

In our view of the case it will not be necessary for us to discuss any of the errors assigned save error No. two, which issue follows: "The verdict is manifestly against the weight of the evidence"

Mike Metas, the appellee, was a witness in his own behalf. He

testified that George Charley was indebted to him in the sum of $30.; that he came to Danville for the purpose of collecting the same, commenced an attachment and garnishment proceeding and secured the services of the appellant as bondsman; that he left Danville with the intention of returning on the day set for the trial, and did return on that occasion, but before he had returned appellant, without any authority as agent or otherwise, had compromised his suit for $15., and the costs, and signed appellee's name to a receipt; that he, appellee, did not owe the appellant at the time and never authorized the appellant to apply the amount of said claim upon his indebtedness; that he had spent, altogether, about $40. in an effort to collect this amount; that his expenses consisted of railroad fare and hotel bills before this suit was commenced.

The evidence of the appellee is contradicted upon material points by four witnesses, Richard Depke, the justice of the peace before whom the attachment suit was pending, testified that appellee came back to his office after the case was begun, and told him that he, appellee, had to go back to his home, and that if anything came up, he, witness, should send for the appellant; that appellant was going to take care of that case; that when the defendant in the attachment case came to his office, a few days before the trial, he, witness, did send for appellant and advised him to compromise and settle, because he did not know how the proof could be made that the defendant in the attachment case was going to leave the state.

The appellant testified that he had known appellee for four or five years; that in 1911 appellee became indebted to him in the sum of $40. and that the same was still standing and unpaid, when the appellee came to his place of business and told him about having commenced the attachment suit against George Charley, and asked him, appellant, to go on the attachment bond; that he, witness, said to appellee: "What about the account you owe me?, and that appellee replied: "The railroad company owes him (Charley) $39., and if you will take and collect this claim and square my account you may have it".;

that he, appellant, agreed, and that he afterwards compromised the case with said George Charley and retained the money, in settlement of appellee's account; that appellee owed him $30. at that time on his account; that when appellee returned on the day the attachment suit was set for trial, appellant told him he had settled and compromised the matter and that then appellee complained about having had to make the trip and "got sore" at appellant.

Peter [illegible]eccons testified that he knew both parties to the suit, that he heard a conversation between them, in September, in which appellee said he owed appellant $30. and that if appellant would sign his bond in some case he would let appellant have all he got out of the case, if it was $39. the full amount, and call the account square between appellant and appellee; that appellant said the constable costs would have to be paid, and appellee agreed to pay same

Angelo Pappas, a baker in Danville, testified that in September, at his bakeshop, appellee told him that he ran a bake shop in Terre Haute and that one fellow owed him some money and that he gave papers to appellant to get the money; that appellee said he started a suit against Mr. Charley, and that it was all left in appellant's hands and he was to take care of the case.

Can it be said in the face of this evidence that the appellee furnished a preponderance of the evidence in the trial of the cause below? We do not think it can.

The verdict, in our opinion, is clearly and manifestly against the weight of the evidence, and the court erred in refusing to grant a new trial, and in rendering judgment against the appellant.

The judgment is, therefore reversed.

We find as a fact that appellant is not indebted to appellee and the clerk will enter finding in judgment.

R E V E R S E D.

$$\frac{\partial^2 \psi}{\partial x^2} + \frac{\partial^2 \psi}{\partial y^2} = 0$$

$$\frac{\partial^2 \psi}{\partial x^2} + \frac{\partial^2 \psi}{\partial y^2} = 0$$

449

6047. April Term, 1913- Agenda No. 32-

Filed Oct. 16, 1913-

David F. Turney.,
Appellee.,

VS. ; Appeal from Shelby.

John W. Coventry.,
Appellant.,

184 I.A. 187

Opinion, Creighton, J.

Ed Widick and F.E.Widick were partners under the firm name and style of Widick Brothers, engaged in the business of mining and selling coal near Findley, Illinois, and had been so engaged for the space of more than ten years prior to the 7th day of August, 1909. During all of that time the appellant had been a regular customer of said firm. On the 7th day of August, 1909, the appellee leased the said mine from the said Widick Brothers, and placed both of the brothers in charge of the business of operating the mine, selling the coal, the same as before the transfer. In the sale of coal after the transfer, the same printed bills were used as before, showing coal bought of Widick Brothers. In fact there was no apparent change in the operation or management of the business after the taking effect of the lease, except that two or three more men were employed after the making of the lease. During the time in question in this suit the appellee did not pretend to remain at the mine, but only visited it occasionally and on the days when the mine workers were to be paid.

Widick Brothers were indebted to the appellant "for money loaned and for meat furnished during the summer just prior to the date of the lease to assist them in paying operating expenses during the dull season" and he was to receive coal in payment of the same. Later, when appellant got ready to haul the coal, (which was after the 7th day of August, 1909,) he called at the mine and said to F.E .Widick: "I am now ready to haul coal," and said Widick said "I will see about it". A short time after, he said

"Go ahead and haul at the same price you always have". After considerable coal had been hauled, and on the 6th day of September, appellee presented his bill and sought to collect from appellant, who declined to pay, on the ground that his dealings were with Widick Brothers, and that they were indebted to him. This was the first knowledge appellant had of the lease to the appellee, or that he was interested in any way in the operation of the mine. Shortly afterwards appellant made a settlement with Widick Brothers, and delivered to them the note for money loaned and receipted their bill for meat, and paid the remainder to the appellee.

Thereupon the appellee brought suit in the justice of the peace court to recover the said account. An appeal was taken to the circuit court of Shelby county where the jury was ~~xxx~~ waived and the cause heard by the court, and a judgment entered against appellant in the sum of $113.26., whereupon this appeal was perfected and the cause brought to this court for review.

The principal question involved in this litigation is whether the appellant dealt with Widick Brothers under such circumstances as shows that he he believed at the time they were the principals.

The proof in this record shows clearly that Widick Brothers were indebted to appellant and that he was to receive coal in the settlement of the same. It is equally clear from the direct proof and the circumstances, that the appellant had no notice of the interest of appellee in the min as principal, and that Widick Brothers were apparently in charge of the mine in the same capacity they had respectively occupied for the past ten years.

"Where a third person who has entered into a contract with the agent in ignorance of the fact that he was not the real principal, as he assumed to be, is sued upon the contract by the principal, he may avail himself, as against the principal, of every defense, whether it be by common law or by statute, which existed in his favor against the agent at the time the principal first interposed and demanded performance to himself". Mechem on Agency, Secs. 773 and 774-5.

The proof is~~xxxxx~~ clear in this case that appellant did not

mean to deal with appellee, but did mean to deal with Widick Brothers, and that he had no knowledge or reason for knowing that Widick Brothers were acting for appellee until September 6. Every man has a right to determine for himself what party he will deal with and if he has expressly dealt with the agent to the exclusion of the principal, without knowledge or reason to know of the rights of the principal, he cannot be made liable to the principal. The true rule has been laid down as follows:- Where a third person, who has entered into a contract with an agent in ignorance of the fact that he was not the real principal, as he assumed to be, is sued upon the contract by the real principal, he may avail himself, as against such principal, of every defense which existed in his favor against the agent at the time the principal first interposed and demanded performance of the contract to himself. Wiser vs. Springside Coal Mining Co., 94 Ill., App.,471.

It is insisted that the rule would be different when the credit is sought to be made upon an old account.

The indebtedness in the case last referred to was an indebtedness existing prior to the opening of the account, as in the case at bar, and there the court held that the credit was properly given.

Under the view we take of this case, no recovery can be had, and for that reason the judgment appealed from is reversed.

R E V E R S E D.

The clerk will enter in the judgment the finding of fact that appellant is not indebted to appellee.

J. C. Mc Bride -

184 I.A. 197

No. 6055. April Term, 1913- Ag. No. 38-

Filed Oct. 16, 1913-

John Maxon.,
Appellee-

VS. ; Appeal from County Court of Logan-

George W. Farley.,
Appellant.,

184 I.A. 197

Opinion, Creighton, J.--

On March 26, 1912- the appellee commenced suit against the appellant before a justice of the peace of Logan county, where a trial was had and judgment rendered against appellant in the sum of $82.85, and costs of suit. Appellant then perfected an appeal to the County Court of said county and filed his bond on the 22nd- day of April with the clerk of said court and supersedeas xxxxxxx and summons were issued. The first term of the County Court after which said appeal was the November Term, 1912. A pretended transcript had been filed, summons served upon appellee and the cause docketed. On the first day of the said term the appellee entered a limited appearance and moved the court to dismiss the appeal for want of sufficient bond, but the court overruled the motion.

Appellee again appeared on the 16th day of December and entered his motion for a rule upon the appellant to pay the clerk of the court the docket fee required by law. The court entered an order requiring appellant to pay said fee by December 24, 1912., which rule was afterward extended until 9 o'clock of December 30, 1912, and the cause set for trial. At 9 o'clock of said day, the appellant not appearing at court either in person or by counsel, the court "dismissed the appeal for failure to comply with said rule and for want of prosecution", and awarded procedendo to the justice of the peace.

Appellant filed a motion praying the court to set aside the order of dismissal and give him an opportunity to make a defense, and supported said motion by affidavit. The motion was overruled, appellant excepted and perfected this appeal to this court.

Six different grounds of error are assigned as cause for the reversal of the judgment herein.

Under our view of the case it will not be necessary to discuss any of the errors assigned, other than number six, which raises

the question of the jurisdiction of the court as to the subject matter involved.

The latter part of Section 15 of Chapter 79, Fla. St. 1941, entitled "Justices", etc., reads as follows: "When the bond is filed before the justice, or the supersedeas is served upon him as aforesaid, the justice shall return all the papers in the case and a transcript of his docket in the case to the clerk of the court to which the appeal is taken, with a certificate under his hand that said transcript and papers contain a full and perfect statement of all the proceedings before him".

The transcript from the justice filed in the case at bar in the County Court, was not in form a compliance with the provisions of the statute above quoted. There was no certificate or pretended certificate of the justice attached to or accompanying the pretended transcript.

It has long been held by our Supreme Court that in order to give a court to which an appeal is perfected jurisdiction of the subject matter, the transcript must be in substantial compliance with the statutes.

Not having been certified to by the justice, the instrument filed cannot be held to be a transcript within the sense and meaning of the statute, and therefore, the court could not take jurisdiction of the subject matter in this cause.

Not having jurisdiction of the subject matter, the court could not make any order affecting the rights of the parties as to the merits of the cause. The court would have had power to have ordered a perfect transcript and require the same to be filed. Or, perhaps the court would have had power to enter any other preliminary order necessary to the preparation of the case for trial. But, until the court acquired legal jurisdiction of the subject matter of the proceeding, its power was limited to preliminary orders.

"Proceedings in the circuit court are based on the transcript, and it has uniformly been held that without a transcript of the proceedings before the justice, the Circuit court has no jurisdiction

of the subject matter. The law conferring jurisdiction on the circuit court provides for the transcript of the cause to said court, and when an appeal has been taken, the court may obtain jurisdiction of the subject matter by requiring a transcript etc to be filed, but until that is done it will have no jurisdiction to try the cause". Denilly vs. Grosvenaud, 201 Ill., 284.

And, in Huston vs. Wright, 158 Ill., App. 284, the same doctrine was announced, in the following language: "While the county court had jurisdiction of the person of the parties, it had no jurisdiction of the subject matter of the suit, because there was no transcript of the proceedings before the justice of the peace".

It is urged by appellee that the appearance of appellant by counsel when the case was called for trial, and afterwards appearing in court and entering a motion to set aside the order and judgment of the court, was a waiver of the jurisdiction , and that, therefore, the appellant cannot now be heard to complain.

The effect of appellant's appearance could not result in giving the court jurisdiction of the subject matter. That could only be conferred in the manner provided by the statute.

We are of the opinion the court had no jurisdiction of the subject matter, andthat the order dismissing the appeal was erroneous.

In Reed vs. Driscoll, 84 Ill., 96, the court, after quoting the statute of 1845 relative to the duties of Justices of the peace in case of appeal to the circuit court, and which statute was in substance the same as our present statute on that subject, and here involved, said: "From these provisions it is manifest that the law designated that the proceedings in the circuit court should be based on the transcript. It supplies the place of a declaration in original suits at law in courts of record, where written pleadings are had. The court had no power to dismiss the appeal until there was a transcript on file".

For the reasons above stated the judgment and order of the court dismissing the appeal, is reversed , and the cause is remanded with directions to redocket the cause and give opportunity to file a complete transcript of the proceedings in the justice of the peace court. Reversed and remanded with directions.

184 I.A. 199

(453)

6059. April Term, 1913. Agenda No. 41.

Filed Oct. 16-1913.

Kate Brown Wyzard., Admx.,
Appellee.

VS. ; Appeal from Macoupin.

Vivian Collieries Co.,
Appellant.,

184 I.A. 199

Opinion, Creighton, J.

This is an action on the case to recover for the death of one George Brown, who was killed in the mine of the appellant on the 8th day of March, 1911, by being run over by a motor car and train of coal cars, while he was working in appellant's mine as a trapper and switchman.

The declaration contains one count, all other counts having been eliminated before the cause was submitted to the jury, and is, in substance, as follows: that the appellant was operating a coal mine by means of entries or roadways on which cars moved to and from the bottom of the mine; that among said entries were the third and fifth north off the main entry; that at a point about twenty feet from where said connecting entry left said third north entry, was a certain switch and at or near which was a certain doorway; that on the day of the injury the appellee's intestate was stationed at said switch or doorway as a trapper, and in addition to said trapping duties, it was his duty to operate said switch for the movement of cars over same; that said entry at the place where appellee's intestate was stationed in performing his duty as aforesaid, there was a certain dangerous condition, in this, that on either side of said track there was a large quantity of gob, slate, rock and other loose material of a thickness of four feet; that the rib on either side of said track was of a distance of ten inches from the side of the car when passing; that appellant wilfully failed to place a conspicious mark at said dangerous place so constituting said dangerous condition; that the appellant failed to report the finding of

said dangerous condition to the mine manager; that by reason of the failure of appellant to observe and obey the provisions of the Mines and Miners Act, while her intestate was discharging the duty aforesaid, he was struck by a moving car travelling upon the said track in said connecting entry and crushed, fatally injuring him and from which he died.

A plea of the general issue was filed to this declaration and the cause was submitted to the court and a jury and the verdict of the jury was returned finding the appellant guilty and assessing appellee's damages at $2,500. Motion for new trial was overruled by the court and a judgment entered upon the verdict, whereupon appellant prayed and perfected this appeal.

The substantial facts as disclosed by this record are that one George Brown was employed as a trapper and switchman by the appellant in its coal mine at the time of his death, his principal duty on the day in question being to throw the switch and open the doors leading into tracks into entries three north and five north, off the main entry, when signalled to do so by the tripman, who occupied a position on a motor hauling the cars. These signals were given by a lighted lantern. A signal straight up and down signified that the motor man wanted to go upon the third north track, and a cross signal indicated that he wanted to go upon the fifth north track. These signals were well understood by the tripman and the switchman, as both were experienced operators in their respective occupations. On the day of the accident here involved, the tripman was at his post of duty on the motor car and gave the signal straight up and down and appellee's intestate, as switchman, observed the signal and repeated it back to the tripman, as was required before the motor man could proceed. At the time the deceased repeated the signal showing he understood it, he was going toward the switch, and the motor man then moved his car forward in the usual manner and did not notice the deceased again until he discovered that he was

going upon the fifth north entry track, in place of the third north. He then leaned forward and saw the deceased standing in the middle of the fifth north track just a short distance in front, and he then called to the deceased to get off the track and deceased made a step but was struck before he could get out of the way of the motor car and his body was dragged considerable distance and the motor and a portion of the cars passed over his body, and death followed.

It is difficult to tell from this record the exact point at which the accident occurred, but along in that neighborhood, and perhaps at the exact point, large quantities of gob lay on each side of the track, variously estimated by the witnesses at from a few inches to two feetin height, at some points extending up to within a few inches of the track, and at other places there was a clear space of from two to three feet. There was no danger mark to be seen in the vicinity of the place where the accident occurred.

Appellant assigns as ground for the reversal of the judgment, eight different alleged errors. Under the view we take of the case it will not be necessary to discuss any of these except the second, which is as follows: "The court below erred in overruling defendant's motion made at the conclusion of the plaintiff's evidence, to exclude all of the evidence, and in refusing to instruct the jury to find a verdict for the defendant.

The appellee seems to rely on her right to recover in this case under her declaration which avers that there was large quantities of gob on either side of the track at the point where her intestate met with the accident , which created a dangerous condition, and that appellant was guilty of negligence in failing to have said dangerous condition examined by the mine examiner, and marked, as the statute requires.

In order to enable the appellee to recover in this case for the wilful failure to comply with a provision of the statute, she must prove by a preponderance of the evidence that such failure was the

proximate cause of the injury complained of. In support of this doc trine we quote from Yeates vs. I.C.R.R.CO., 241 Ill., 205, where the court say: "It wase necessary to prove the negligence charged was the proximate cause of the injury , and the nearest ~~ax~~ independent cause which is adequate to produce and does bring about the accident, isthe proximate cause of the same and supercedes any remote cause".

And, in Odorizzi vs. Southern Coal and Mining Co., 151 Ill., App., 393, it is said: "The plaintiff's contention seems to be that it was not necessary for him to prove that the violation of the statute was the proximate cause of his injury to entitle him to recover The plaintiff says in his argument: 'If the pit-boss of the defendant in error had not ordered the plaintiff in error to go there and work in the room, which was opened up in violation ofthe law, he would not have been injured'. That is true and it is also true that the room was opened in advance of the air current in wilful violation of the statute. But that is not enough. It must further appear from the evidencethat if the statute had been complied with, that is, if the proper cross cut had been made in advanceof this room and the air current had been travelling properly thereby, that the plaintiff would not have been injured. In other words , the wilful violation of the statute must be shown to have been the proximate cause of the injury. Failing to introduce evidence proving, or tending to prove, this material and necessary element of recovery, the cause was properly taken from the consideration of the jury."

See also Schlapp vs. McLean Co., Coal Co., 235 Ill., 630 and Faietta vs. Illinois Zinc Co., 153 Ill., App., 506.

The circumstances surrounding the accident must be understood in order to determine what was the proximate cause of the injury. The deceased was directed to throw the switch admitting the motor and cars to the track on the third north entry track. Instead, by mistake we suppose, he opened the switch permitting the motor and

cars to n enter the fifth north entry track, and then, for some unaccountable reason, went several feet forward in the direction in which the motor and w cars were running and stopped in the middle of the track, and was seen standing there when the motor man passed onto that track and discovered that the deceased had switched them onto the track in the ~~sixth~~ fifth north entry in-stead of the one in the third north entry, as intended.

It would seem that the deceased felt secure in the position tak en by him, for there was no effort on his part to leave until the motor man called to him, and he then made an effort to step off, but was struck by the motor car.

Appellant insists that the accident occurred by reason of the deceased opening the switch into the fifth north entry by mistake, and, thinking he had opened the switch into the ~~sixth~~ third north entry, he took his position on the fifth north track, which he regarded as safe.

Be the reason what it may ~~be~~ for his action ~~as~~ at the time, it is conceded that he was directed by the signal to open the switch into the third north entry: That he understood the signal at the time cannot be open to question, as he repeated it back as the rules required.

The question here presented is, what was, under all of these circumstances, the proximate cause of the death of appellee's intestate?

It is insisted by the appellee that the death was brought about in consequence of the failure of appellant to mark the places which she contends were made dangerous by the accumulation of gob, as the statute requires.

To sustain a recovery the proximate cause of the death of appellee's intestate, like any other material fact, must be proven by evidence introduced upon the trial of the cause, to have been the result of the wilful failure of the appellant to comply with the statute by marking and giving notice of the dangerous places, as alleged in her declaration.

Appellee made proof of the failure of appellant to mark as dangerous the point at which her intestate lost his life, but we fail to find any evidence in the record showing that the point in question was made dangerous by the accumulation of gob, or that the absence of gob at the point would have prevented the accident. Neither is there any evidence in this record that appellee's intestate could not have secured his safety by getting off on either side of the track, or that he made any effort to find a place of safety until his attention was attracted by the motor man, and that he then made an effort to step, but that the time intervening was so short that he was unable to get away.

Can it be said that from the description of the gob on either side of the track, as disclosed by the evidence, that appellee's intestate could not have found a place of safety in easy reach, if he had expected that the motor and train of cars was entering the track in entry five north.

The more reasonable conclusion to be reached from the evidence in this record is, that by mistake appellee's intestate threw the switch leading into entry fifth north, and, thinking he had obeyed the order given, went over into the middle of the said track and did not realize the mistake until it was too late.

We think it was necessary in order to sustain this declaration, that the appellee prove, by a preponderance of the evidence, all of the material allegations contained therein.

"It is impossible from the evidence to say whether the dirt created a dangerous condition, but whether it did or not, there was no connection whatever between it and the death of Cook, and the plaintiff could not complain of the neglect of a duty, whether wilful or otherwise, which did not cause any injury to her. There was no evidence tending to show that the dirt caused or contributed in any manner, or any degree, to the accident". Cook vs. Big Muddy Coal Co., 249 Ill. 41-

The language just above quoted announces the true rule as to the degree of proof, and is peculiarly applicable to the facts in the case at bar.

For the reasons given above we conclude that the appellee failed to prove her cause of action as alleged in her declaration, and that the court erred in not giving to the jury the peremptory instruction as asked by the appellant. The judgment is, therefore, reversed.

R E V E R S E D.

Finding of fact: We find as a fact that the negligence charged in the declaration was not the proximate cause of the injury to appellee's intestate.

J. A. Wright, Jr.

606. 184 A 200

April Term, 1915. Agenda No. 44.

Filed Oct. 16, 1915.

R.C.Cox, et al., Trustees of American Lodge, I.O.O.F.,920.,

Appellants,

VS. ; Appeal from Sangamon.

K.A.Flagg.,

Appellee.

184 I.A. 200

Opinion, Creighton, J.

This suit was brought before a justice of the peace of Sangamon County by the appellant Lodge against the appellee, to recover the sum of $30., claimed to be due from him to the Lodge. An appeal was had and taken from the judgment of the said justice of the peace, to the Circuit Court of Sangamon County, where the cause was again tried, by the court. Upon the hearing the court found the issues for the plaintiff and assessed plaintiff's damages at the sum of $10., and found "that the sum of Ten xxxxxxx Dollars was tendered by the defendant to the plaintiff and kept good and same is now on deposit with the clerk of this court".

Motions for new trial and in arrest of the judgment were filed and by the court overruled, and this appeal was thereupon prayed, granted and perfected.

The following are conceded to be the material facts connected with the transaction out of which this suit grew. The appellee, as an officer of the appellant Lodge, on October 1, 1908, leased the hall in which appellant met, at Sherman, Illinois, as agent or representative of the lodge, and became personally responsible for the rent, and xx from that time on paid the rent, sometimes out of moneys belonging to the appellant and at other times advanced his own money and presented the rent account to the lodge later, when it would be approved and paid. This xxxxxxxxxx arrangement continued until the time in question in this suit. About the 1st of May, 1911, appellee notified xx the appellant that he had rented the hall

in his own name and that they could use it on the same night they al ways had and were to pay to him the same rent they had theretofore paid. Appellee paid the rent for March and April in the name of appellant, and made out a bill for the sum of $10 ., and presented a bill to appellant for the rent due to him, as lessee, for the months of May and June, 1911., and at the same time made report of the collections made by him for rent due the appellant . The collections reported by him amounted to the sum of $30. The amount due to him for rent advanced for appellant and rent due to him as lessee, amounted to $20., leaving him indebted to the appellant in the sum of $10., which he then tendered and offered to pay. The tender was declined At the time the appellee leased the premises in his own name, it was agreed that appellant should continue in possession at the same rent as before and the appellant was advised of that arrangement and continued to occupy the hall for the months of May, June and July, 1911.

Appellant assigns as the principal ground of error that the court erred in allowing appellee to set off sums of money paid to the owners of the building, against the ~~sums~~ sums due to appellant.

It appears from the evidence in this record that appellee, while acting as an officer of the appellant, contracted for the use of the building in question for the use and benefit of the appellant, and from that time on, as representative of the appellant, he had paid the rent when it became due, sometimes out of his individual money, in which case bills were presented to the appellant and allowed and at other times he paid said rents with money belonging to appellant. This arrangement continued up to the time of the payment of the rent in question, without objection on the part of appellant. The first objection to this arrangement, so far as this record discloses, was after the appellee had, as usual, paid the rent for the appellant amounting to the sum of $20, collected money owing to appellant in the sum of $30. and presented a receipt for the rent and asked credit for the same, and tendered the sum of $10. in cash. Appellant declined to allow appellee credit for the $20. rent paid by him for appellant. It was admitted that the $20. rent so paid was a just debt.

We believe appellee acted in good faith in the payment of the rent in question, and fully expected appellant would reimburse him for said advancement just as they had done in every instance before.

Under these circumstances it appears that there was an implied obligation on the part of appellant to give credit to appellee for the amount of the rents so paid by him, for the reason appellant had received and accepted the use of the building and the services of appellee in a like capacity for five years last past prior to the transaction here involved, without objection or controversy.

We find no reversible error in this record, and believing that justice has been done, the judgment is affirmed.

A F F I R M E D.

1913 —

Jas. A. Creighton, Jr —

4 A 201

433

No. 6070. April Term, 1913- Agenda No. 47-

Filed Oct-16-1913

Joseph E. Helfrich,
Appellee.,

VS. ; Appeal from Hancock.

John F. Scott,.,
Appellant.,

194 I.A. 201

Opinipn, Creighton, J.-

This was an action in assumpsit to recover upon a promissory note. The declaration was in the usual form with affidavit of merits attached.

The plea of the general issue and several special pleas, which, in effect, raised the statute of limitations, want of consideration and that the basis of the claim for which the note was executed, was a gambling debt, were filed by appellant. Replications were filed denying the facts set out in each of the special pleas.

The cause was heard by the court and a jury, resulting in a verdict and judgment in favor of appellee, and against appellant, in the sum of $217.82. The appellant thereupon obtained leave to prosecute this appeal and has perfected same, thus bringing the record here for review.

The substantial facts presented by this record are as follows:- In the year 1897 the appellant engaged in a game of cards in the City of Keokuk, Iowa, and lost Seventy-five dollars, and gave one Hewitt a check for the same on a bank at Carthage, Illinois. The check was not honored, and in a short time thereafter Mr. Hewitt came to Carthage for the purpose of collecting this debt, sought out the appellant and threatened him with prosecution and exposure, unless he paid the check. Appellant and Mr. Hewitt went, together, to the meat market of the appellee, and appellant introduced Mr. Hewitt to appellee and then related to him the whole transaction, and asked appellee to take up the check for him and save him the disgrace of exposure, and promised appellee he would pay him. Appellee took up the check, and in a few months time presented the $75. check and a meat

bill of $37.50 to appellant and requested payment. Appellant did not have the money, and gave to appellee his note for the sum of $112.50, dated April 22, 1898, due in nine months and drawing interest at the rate of seven per centum per annum. Afterwards appellant made three small payments on said note, the date of the last payment being August 22nd, 1909.

It is true that appellant does not agree that all of the above facts are true, but we are of the opinion that when all of the facts and circumstances are considered together, the above statement will be found to be correct.

A number of errors are assigned as ground for the reversal of the judgment, but in our view the whole case turns upon the question raised by the plea setting up that the note in question was given for a gambling debt.

There is no contention in this case that the appellee was present in Keokuk, Iowa, when the gambling took place, or that he was interested in any manner, directly or indirectly therein, but it is contended by appellant that appellee bought the check in question from Mr. Hewitt, and by reason thereof, cannot recover in this suit.

We cannot agree with appellant in this view of the case. All of the facts and circumstances, upon this question, lead us to the conclusion that appellant sought and received assistance in his hour of trouble from his old friend, the appellee, and that appellee took up the check and carried it and a meat bill for $37.50 for months, at the request of the appellant, and that then appellant adjusted both accounts by giving the note in question.

The several payments made by appellant, clearly takes the note out of the effect of the statute of limitations.

We do not find any reversible error in this record, and the judgment is, therefore, affirmed.

A F F I R M E D.

April Term—
1913—

H. M. Haggard—J

437

6075. April, 1913- Agenda No. 50-

Filed Oct-16-1913

Clarence Swango.,
Appellee-

vs. ; Appeal from Edgar.

Cleveland, Cincinnati, Chicago and
St. Louis Ry. Co.,
Appellant-

184 I.A. 207

Opinion, Creighton, J .

This was a suit commenced in the Circuit Court of Edgar County by the appellee against the appellant company to recover damages from the appellant because of ~~xxx~~ injury to his horses.

The declaration consists of three counts. In substance the first count alleges that the appellant's rail road passes through the lands of the appellee, and that to enable appellee to pass from one point of his farm to another over the right of way of the appellants ~~xxxx~~ railroad, the appellant constructed what is known as farm crossings and gate; that the appellee was pasturing eight head of horses on the farm on one side of the railroad right of way; that on the ~~xxxxxx~~ night of July 5, 1912, the gate in question, being one of those erected by the appellant, was open, and the horses in question passed from the pasture onto the railroad track of appellant, and four of them were ~~x~~ killed by the locomotive and train and three others were badly injured; that appellant was negligent in not providing and maintaining suitable and sufficient fences and suitable and sufficient gates to prevent the said horses from going upon the right of way.

The second count , although in different language, is in substance substantially the same as the first.

The third count avers that appellant operated its locomotive engine and train of cars in a negligent , careless and reckless manner, by reason thereof, ran over appellee's horses which had ~~xxxxx~~ strayed onto said right of way and railroad track, and killed four

and injured three other of the said horses, appellant nothaving provided suitable and sufficient fences and gates to prevent stockfrom going upon the tracks, as the law provides.

The plea of the general issue was filed, trial had before the court and a jury, resulting in a verdict and judgment in favor of the appellee in the sum of $690. andecosts of suit. From this judgment thisappeal was prayed and perfected, thus bringing the record before us for review.

At the close of all the evidence the appellant asked the court to give a peremptory instruction directing the jury to find for the appellant, but this court refused, and this action of the court is assigned as error.

The material facts in this case are that the appellee was the owner of a certain tract of land used and occupied by him as a farm. Appellants railroad ran through said tract of land. On the 1st. or second day of July, 1912, the appellee turned eight head of horses in a pasture, on his farm, which lay adjoining the right of way of the railroad . A farm crossing and gates had been erected by the appellant about five years prior thereto, and which gate was made of good material, of sufficient height and what is known as a "sliding gate" and was conceded to be sufficient, with the exception that what is called the "hinge" end of said gate was several inches lower than the other end. The gate was fastened by two slats or bars extending out about one foot beyond the end of the gate and rested upon cleats nailed between two posts, so that, before the gate could be opened it was necessary to slide it back off of these cleats about one foot. On the day that appellee put his horses in the pasture, he further secured this gate by getting a very heavy piece of timber which he found by the right of way, and placed it through the slats of said gate to more securely fasten the same. On the night of the 5th of July, 1912, the gate was opened in some manner not disclosed by the evidence, and the horses in question passed onto the right of way and four of them killed and three injured.

The section men of appellant had passed over the track at this point on a tour of inspection on the morning of the 5th of July, and it is clear from their statements that the gate was, at that time, in its usual closed condition. In fact, for five years the gate had stood there and had never been seen open so far as this record discloses.

The only question raised by the evidence in this case is as to the negligence of appellant in failing to construct and maintain a suitable and sufficient gate at the farm crossing in question. There is no proof that appellant negligently or recklessly handled its locomotive or train at the time of the accident.

Before appellee could recover in this case, he must prove by a preponderance of the evidence that by reason of the negligence of the appellant the gate in question was not reasonably sufficient and suitable to turn stock. It is not enough that appellee should prove that in some manner or by some means unknown to him, the gate at the time in question was opened and his horses permitted to enter upon the railroad right of way and be there killed.

It is contended, however, that the gate, at what is called the "hinge" end was lower than it was at the other, and that the effect of the wind, or the rubbing of the horses against the gate, might slide or press it backward and press it open and admit the stock onto the right of way.

We concede that this might be possible, but under all of the circumstances in this case it was highly improbable. It will be remembered that the evidence in this record shows that this gate had been standing and doing service for the period of five years, without ever having been blown open by the wind or pressed open by stock.

On the occasion in question the strength and security of the gate was reinforced by the appellee placing on the front end of the gate a long and heavy plank, and interlocking it between the bars of the gate. To describe this board or plank in the language of the appellee, "it was a very heavy plank, it was almost as much as I could carry".

It was admitted by appellee upon the witness stand that the gate was of the usual pattern of sliding gates and that it was made of good material and of sufficient height and that at the time in question it was in a good state of repair and preservation. The only objection offered to the manner of the construction of the gate or the material out of which it was constructed , was that the "hinge" end was eight or nine inches lower down than the other end, and that this would have the effect to make it easier to slide back. Appellee stated as a witness, on the trial of the cause, that he was out until 10 o'clock on the night of the accident, and that he did "not think the wind was blowing, and if so to no considerable extent".

The evidence in this record fails to show that horses had been standing, stamping or rubbing against the gate on the night in question, so we may say there is absolutely no proof in this record in support of either theory of the prosecution, i. e. , that the wind may have blown the gate open, or that the horses may have rubbed it open, but, to the contrary, the wind did not blow to any "considerable extent" on the night in question, and neither was there disclosed any evidence of the rubbing by the horses against the gate, or proof of footprints where the horses had stood and stamped at the gate as though they were in an effort to press it open.

In this case we are asked to say that the appellant has been negligent either in the construction or maintenance of the gate in question and that by reason of that fact, either the wind blew the gate open or that the horses xxxxxxx pressed it open. We are unable to conclude that the evidence in this record is sufficient to show any negligence on the part of the appellant. It is more reasonable to suppose that some person passing through said gate left it open, than to suppose the horses pressed the gate open or the wind blew it open, and yet, there is no xxx evidence to support that theory. The most that can be said from the proof in this case is, that the

gate was open and the horses passed through to the right of xx way and track and were killed and injured. There is no fact or circumstance shown by this record that gives the court any information as to how the gate did come open.

The evidence in this record is not sufficient to support the judgment rendered herein. The court shouldhave given the peremptory instruction as asked by appellant.

For the reason herein stated the judgment is reversed.

Rx R E V E R S E D.

Finding of fact: We find the appellant was not guilty of the negligence charged in the declaration.

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1913

Rehearing No. 33-

Gen. No. 33- October Term, 1912- Agenda No. 23-

Filed Oct. 16, 1913-

J.J.Ellsworth and Harry McNair, partners, doing business under the firm name of Ellsworth and McNair.,

vs. Attachment.

William Fink.

184 I.A. 223

Louis Heilbrunn et al., ~~and David Kahn, as Heilbrunn and Kahn.,~~ Intervening plaintiffs.
Appellants

VS. Interpleader.

J.J.Ellsworth et al., ~~and Harry McNair, as Ellsworth and McNair.,~~ Defendants.
Appellees- Appeal from Mattoon City Court.

Philbrick, J.-

Ellsworth and McNair brought an attachment suit against one William Fink, levying upon the property in question. Heilbrunn and Kahn, claiming the property levied on was not the property of William Fink but the property of Heilbrunn and Kahn, filed an intervening petition in the attachment suit. Ellsworth and McNair filed pleas to the intervening petition by appellants, to these pleas Heilbrunn and Kahn demurred, the demurrer was overruled by the trial court and appellants having elected to stand by their demurrer, judgment was rendered on the demurrer against appellants for costs. Heilbrunn and Kahn appeal from that judgment.

The case was first submitted to this court and opinion written affirming the judgment because no assignment of errors had been made upon or attached to the record under the rules of this court. Appellants filed a motion to set aside the judgment and for leave to assign errors, or in the alternative, a petition for rehearing. In passing upon this motion, the court set aside

its judgment affirming the cause and granted appellants leave to assign errors upon the record. The cause was then again submitted to this court; and now upon examination of the record, we find that the only judgment rendered by the trial court is a judgment on the demurrer for costs. There is no judgment finding that the property was the property of the defendant in the attachment, Fink, nor is there any judgment that appellants are not the owners of or entitled to the property shown by the record, and under the holding of the courts of appeal in this state,, the judgment for costs is not a final judgment.

Chi. P. Co. v. Crayon Co., 217 Ill., 200.

Although the question that no final judgment was rendered in the lower court has not been raised by counsel and although they have submitted the cause the same as though a final judgment had been rendered, the question is jurisdictional with this court and an appeal from an interlocutory judgment, such as a judgment for costs alone has repeatedly been held to be, this court obtains no jurisdiction by reason of the appeal, the appeal is, therefore, dismissed with permission to either party to withdraw the record and make application to the trial court for a final judgment.

1912

#33

Abstract of suit withdrawn by the parties to the suit

John McAuliffe Jr.

Judge City Court

463

184 I.A. 239

Gen. No. 52- Oct. Term, 1912- Agenda No. 62-

Filed Oct. 16, 1913-

Ezekial Edwards,

Appellant.,

vs. ; Appeal from Morgan.

Elijah Etter.,

Appellee.

Philbrick, J.-

Appellant owned a farm of one hundred thirty acres near Modesto, Illinois. Appellee, who is a real estate dealer in Morgan County, brought this action to recover a commission alleged to be due him for services rendered in procuring a purchaser for the farm of appellant. The trial below resulted in a judgment in favor of appellee for Two hundred seventy dollars.

Numerous errors are assigned on the record urging a reversal of this cause, but from the view that this court has arrived at it will be necessary to consider only one of the errors assigned.

The first meeting of the parties relating to this cause of action occurred at a casual meeting of appellant and appellee at a railroad station at Waverly, Morgan County, Illinois.

Appellee contends that at that time appellant placed this farm of one hundred thirty acres in his hands for sale, and agreed to give him a commission of two per cent if he sold the farm at Ninety Dollars per acre, and to allow him as further commission all that he could get over Ninety Dollars per acre. No purchaser is claimed to have ever been found at this figure, and appellee testified that the price was afterwards raised from Ninety Dollars at various times until it reached the price of One Hundred Twenty Dollars per acre, and appellee produces in evidence a book kept by him in his office in which he made a memorandum of the conditions on which the farm was to be sold.

This memorandum shows that he was required to find a buyer at One Hundred Twenty Dollars per acre, for which he was to receive two per cent commission, and was to receive as extra commission all that he could get over One Hundred Twenty Dollars per acre. After this time nothing was heard from appellee until the farm had been sold by appellant; after appellee discovered that the farm had been sold, he then made a demand upon appellant for his commission of two per cent on One Hundred Five Dollars per acre, the price for which appellant sold the farm.

The declaration consists of the common counts and one special count. Appellee stated at the trial that he relied alone upon the special count for a recovery, and that all he would claim under the common counts would be for interest. The special count upon which appellee relies for recovery alleges that the land was placed in his hands for sale at One Hundred Twenty Dollars per acre, and that if he secured a purchaser for One Hundred Twenty dollars per acre he was to receive two per cent commission on the sale; the declaration then avers that he procured a buyer in accordance with the terms and conditions of of the contract, and that to the buyer, so found and produced to appellant by appellee, appellant sold the farm for One Hundred Five Dollars per acre. The evidence in this case discloses that appellee learned that one Whitlock, who afterwards contracted to purchase this farm from appellant, was in the market for the purchase of a farm, appellee then endeavored to sell to Whitlock a farm which appellee himself owned, and failing in this, he then informed Whitlock that he had appellant's farm for sale at One Hundred Twenty-five dollarsper acre. Whitlock told him the farm was priced too high, and that he would not even look at it; but appellee requested Whitlock to go with him to see the farm, Whitlock declined said he knew where the farm was and could drive by it on his way home that evening. So far as this record discloses, appellee had nothing further to do with the sale of this farm, he never brought appellant and Whitlock together and never informed appellant that he ever had a prospective purchaser for the farm. He never

priced the farm to Whitlock at the price he says he was authorized to sell it.

About two years after this transaction one John Edwards attempted to interest Whitlock in the purchase of this farm, induced him to go and look at it, and upon the representation made by Edwards. Whitlock requested him to ascertain at what price the farm could be purchased from appellant; and as a result of the negotiations between Edwards and Whitlock, Whitlock purchased the farm from appellant at the price of One Hundred Five Dollars per acre. There is no contention by appellee that he ever informed appellant Whitlock was a prospective buyer or that the farm was sold to Whitlock by appellant at a less price than One Hundred Twenty Dollars per acre with any intention or purpose of depriving appellee of a commission. The declaration alleges that appellee found a buyer at the price agreed upon. One Hundred Twenty Dollars per acre, and does not in any manner set forth how or in what manner appellee became entitled to a commission on the sale at One Hundred Five Dollars per acre; which the declaration alleges the farm was finally bargained to be sold at. The evidence not only fails to support the contention and claim made by appellee but shows conclusively that he did nothing whatever to bring about this sale, did nothing which resulted in any way in procuring a purchaser for this farm. The sale was never consummated. Whitlock declining to take the farm on account of a defect in the title to ten acres.

To permit a recovery in this case would require us to hold that after a farm was once placed by the owner in the hands of a real estate dealer for sale, the owner will be required to pay a commission if after that time the owner sold the land. To entitle the broker to a commission he must be the efficient cause in either affecting a sale or in finding a buyer who is ready, willing and able to buy at the stipulated price or to whom the owner afterwards sells.

The verdict of the jury is clearly and manifestly contrary to the evidence, and the judgment is therefore reversed.

The Clerk will enter in the judgment in this court the finding that appellee was not the efficient or procuring cause in securing a purchaser for the farm, and took no part therein.

Judgment Reversed.

184 A 247

Dec. 3 - 1913 -
R. K. Denied -

Gen. No. 61. Oct. Term, 1912- Agenda No. 47-

Filed Oct. 16, 1913-

Flora Oliver,
Appellant.,

vs. ; Appeal from Macoupin County

The First National Bank of Court.
Mt. Olive.,
Appellee-

184 I.A. 247

Philbrick, J.-

Appellee, the First National Bank of Mt. Olive, commenced an action in attachment against one Lax Lange for an alleged indebtedness on two promissory notes. A writ of attachment was issued and levy made by the Sheriff of Macoupin County upon a certificate of stock of the face value of Seven Hundred Dollars, issued by the Staunton Home Association of Staunton, Illinois. After the levy of the attachment upon this certificate of stock, appellant Flora Oliver, gave notice to the Sheriff that she was the owner of the said certificate of stock, claiming the same as her own property, that it was not the property of Max Lang, and demanded the return of her property. Under the statute in such cases, the Sheriff made due return to the County Court as provided by law, and proper notices were given to the parties interested, and this case came to trial in the County Court upon a trial of the rights of property under the statute. The case was tried before the County Judge of Macoupin county without the intervention of a jury, the jury having been waived by the parties by agreement. After hearing all the evidence and the arguments of counsel the County court found the issues in favor of the defendant, finding that the claimant was not the owner of the certificate of stock, and had no interest therein. The findings of he court were excepted to and appeal prayed to this court. The errors assigned upon the record are that the Court erred in finding the issues for the defendant and rendering judgment against the claimant, that the finding is manifestly contrary to the law and the evidence.

Neither the claimant nor the defendant presented to the Court to be ruled thereon by him any questions of either fact or law; and under repeated holdings of the Supreme Court and this court, where a trial is had before the court without the intervention of a jury where the record discloses that the only question to be determined is a question of fact and no propositions of ~~x~~ law or fact have been submitted to the court to be passed upon by it, there is nothing preserved in the record for the determination of this court.

No questions having been preserved as required to bring the questions in dispute before this court for its determination, there is nothing for this court to determine, and the judgment is affirmed

A F F I R M E D .

1914-

1944

P. L. Snell - Co-ed.

Nov- 5- 1913
R- H- Denied -

Filed Oct- 16- 1913

Sarah A. Franklin,

Appellee,

vs.

The Continental Casualty Company (Incorporated)

Appellant,

Appeal from Boswell.

184 I.A. 259

Whitrick, J.

This is an action brought by appellee against appellant to recover upon an accident policy issued by the appellant company to appellee's husband in his life time. The insured was a flagman upon a railroad crossing in the city of Orin. The policy was for the principal sum of Five Hundred Dollars, and was payable only for accidental death caused by external and violent means without the intervention, directly or indirectly, of any other cause. On the day on which the insured met his death he went to work as usual in the morning, and returned home after his day's work was finished at about 6:15 p.m. and was in his usual health. He ate a hearty supper, then went across the lot on the [illegible] where he lived to a closet, upon starting to return to the house after visiting the closet, it being the time he was expected from the closet, he was seen by two persons to fall forward, his head striking a cedar post lying across or near the path leading to the closet. The parties who saw him fall went to his assistance, lifted him up, and carried him to the house, laid him across a pillow on the porch, while lying there he recognized his wife, but was unable; shortly after he was placed on the porch blood issued from his mouth and nostrils and made quite a pool upon the floor of the porch; Dr. Grimmer who was called arrived about seven . m. the insured was dead when he arrived. Proofs of loss were made by appellee under the terms of the policy, appellant refused to pay; this action was brought upon the policy, and a judgment rendered against appellant.

Appellant insists that it is not liable claiming that the application for the policy of insurance is a part of the contract of insurance and that all representations in the application were made warrantion, that the insured gave his age at the time of the application as fifty-six and contending that his true age at that time was sixty-five years, and that this representation that he was fifty-six was false, was a material representation and warranty and that by reason thereof the policy is void. Appellant also insists that the agreement to pay this policy was only made upon the condition that the death be caused by accidental, violent and external means, without the intervention, directly or indirectly, of any other cause and insists that the insured was suffering with arterial sclerosis for a number of years prior to the time of the issuance of the policy, and that his death was caused by reason of the bursting of an artery in the lung producing a hemorrhage which caused his death, and that the bursting of this artery was caused by reason of the disease, arterial sclerosis, that the fall was not sufficient to have caused death except for the weakened condition of the arteries caused by the disease; appellant also contends that the court erred in the admission and rejection of evidence and the giving of instructions on behalf of appellee and refusing instructions asked by appellant.

After obtaining the policy in question the insured continued a member of the order in good standing and paid all dues and assessments thereon. The policy was issued April 21, 1910 and the insured died August 17, 1910.

The evidence is undisputed that the deceased fell and struck his chest upon the cedar post, and as a result there was a black and blue mark across the chest some two inches or more in width. The record does not disclose what caused the deceased to fall, and appellant contends the autopsy may have

been ruptured before the fall and that the deceased may have fallen by reason thereof. About fifteen minutes after the fall the hemorrhage of the lungs was observed and this hemorrhage caused the death. While it is shown by the evidence that arterial sclerosis will weaken the arteries of a person, there is no evidence in this record to show that the disease, although the insured may have been suffering therewith, caused or produced his death or contributed in any way thereto; while this disease has a tendency to weaken the arteries and to cause them to burst by accidents which would not cause the bursting of a healthy artery, there is nothing in this record to show that the fall which the insured received and the force with which he came in contact with the post was not sufficient to have caused a healthy artery to burst. The record does not disclose that arterial sclerosis, although the insured may have been suffering with it, in any way, contributed to his death and the evidence in this record shows that the insured fell striking his chest across the post, which produced bleeding and blue marks of two or three inches in width across his chest and the fact that he died by reason of a pulmonary hemorrhage about fifteen minutes later was sufficient to warrant the jury in finding and returning a verdict that the insured came to his death by reason of accidental, external and violent means, unassisted or caused directly or indirectly by any other cause.

The coroner of Hartwell county held an inquest over the body of the deceased, and the jury impaneled returned the following verdict:

"We, the undersigned jurors sworn to inquire into the death of James L. Franklin, on oath do find, that he came to his death by a pulmonary hemorrhage, said hemorrhage being caused by natural causes."

This verdict was introduced in evidence by appellant over the objection of appellee. The verdict of the coroner's jury having been admitted in evidence the court limited the

instructions eliminated from the consideration of the jury the finding that the pulmonary hemorrhage was produced by natural causes, and appellant insists that the court erred in thus limiting the verdict of the coroner's jury, and insists that it should have been submitted to the jury together with the other evidence in the case without any limitation by instructions. The verdict of the coroner's jury was properly admitted in evidence by the court, and we think properly limited by the instructions of the court. The province of the coroner's jury was to return a verdict finding the cause of the death, which they properly did in determining that the death was caused by a pulmonary hemorrhage, but we are of the opinion that when the jury undertook to determine whether or not this hemorrhage was produced by natural or unnatural causes they exceeded the powers conferred upon them by law.

Calloway v. Spurgeon, 15 Ill.App. 571.

L. N. & M. . Ry.Co. v.Taylor, 68 Ill. App. 505.

Appellant filed a special plea setting up that misrepresentation in his application for insurance represented his age as fifty-six years, and that this application was made a part of the contract of insurance by proper reference thereto in the policy; that the representation was made a warranty under the terms of the policy, that said representation was false and that the age of insured was sixty-five years, and not fifty-six. The plea does not show the insured admitted that this was a material matter. To this plea appellee filed a replication denying that the age was material or in any way increased the risk of insurance. A demurrer to this replication was overruled, and appellant insists that the court erred in overruling this demurrer. This replication denies the question of the materiality of the age. The cause was tried with this issue involved, and we do not find in this record any evidence

whatever to support the plea that the representation of the deceased as to his age was false. The burden of proving this issue was upon appellant and without having produced any evidence or attempting to prove the age of the insured, although the court may have erred in overruling the demurrer on this record, appellant has not been injured thereby.

It is insisted by appellant that the court erred in refusing to direct a verdict at the close of plaintiff's evidence. We are satisfied that the court did not err in denying this motion and refusing the instruction. The evidence offered by plaintiff showing that the insured fell, striking his chest upon the post and that within a short time thereafter, blood began to flow from his mouth and nostrils as a result of a hemorrhage of the lungs, showed such a condition as to require the court to submit to a jury the question as to how and in what manner the insured met his death.

Appellant criticises Instructions Number Eight and Number Nine given to the jury on behalf of appellee, insisting that those instructions required that in order to defeat a recovery the defendant should prove by a preponderance of the evidence in the case that the deceased came to his death by reason of natural causes. We do not so interpret those instructions, and the instructions must be considered as a whole. The last, together with the declaration, presented to the jury the question as to whether or not the deceased came to his death by reason of an accident or from natural causes. While the burden of proof is on the plaintiff to show by a preponderance of all the evidence in the case that the deceased came to his death as covered in the declaration, by means of accidental, external and violent means, independently of all other causes, the plaintiff having made a prima facie case by

her evidence, the burden then fell upon the defendant to rebut his prima facie case, and one of the defenses was that the deceased met his death by natural causes, and having produced a prima facie case, the burden then was upon the defendant to meet this prima facie case in accordance with the averments of these pleas. These instructions Number Eight and Nine referred solely to these pleas and to the question whether death was caused by natural causes as averred in these pleas. There was no error committed in giving these instructions.

We have examined the questions raised by appellant upon the admission and rejection of evidence and also upon the question of giving and refusing of other instructions, and we are satisfied that the court committed no reversible error therein; and we do not consider it necessary to further discuss the questions raised upon this record.

There being no reversible error, the judgment of the trial court is affirmed.

Affirmed.

#173

1-24-1973

Gen. No. 21. October Term, 1913. Agenda No. 56.

Filed Oct. 16, 1913.

Dec. 2-1913-R.K.

Andrew J. Miller.,
Appellee-

vs. ; Appeal from Macon.

Assured's National Mutual
Fire Insurance Company.,
of Decatur, Illinois.,
a corporation.,
Appellant-

184 I.A. 271

Philbrick, J.-

This is an action by appellee against appellant upon a policy of insurance. ~~The property of appellee was insured by a policy of insurance.~~ The property of appellee was insured by a policy issued by the Illinois National Fire Insurance Company; while this policy was still in force, the Illinois National Fire Insurance Company passed into the hands of a receiver. Appellant company entered into an agreement to reinsure the risks of the Illinois National Fire Insurance Company, obtained a list of the policy holders of that company and forwarded to them a statement of the conditions under which they would re-insure these risks. These conditions required the policy holder to assign to appellant whatever claim he might have against the Illinois National Fire Insurance Company for unearned premium and pay the balance in cash, and upon making this assignment and payment of the difference in the premium appellant company agreed to re-insure these risks.

This is the second appeal of this case to this court, upon the former appeal the judgment of the trial court was reversed and the cause remanded. The former opinion was written by Mr. Justice Puterbaugh, and the facts are fully stated in the former opinion found in 164 Ill. App. 237. The facts concerning the issuing of this policy are the same in this record as they were at the time the former opinion was written. This court then held that the correspondence had concerning the policy of insurance created a

contract between the insured and the appellant company, and this court is now bound by the law as stated in that opinion, and also by the facts which were then found so far as the evidence is the same in this record. This court at that time passed upon the question then raised concerning the competency of the statements made by L.A.Miller, who appellant contends was the agent of the insured after the issuance of the policy; we then held these statements incompetent, and we are not disposed to disturb that holding.

The pleadings are the same upon this hearing as they were at the time the case was previously here, with the exception that defendant filed six additional pleas before the second trial. A demurrer was sustained to the first, third, fourth and fifth additional pleas, appellant elected to stand by its first, and took leave to amend the third, fourth and fifth additional pleas. To these amended pleas the Court sustained a demurrer. Appellee replied severally to the second and sixth additional pleas, issue was joined thereon.

There are but two questions presented in the argument of appellant on this hearing which have not been determined by the former judgment of this court. These questions are, first, upon the sustaining of the demurrer to the special pleas filed by appellant, and second, upon the ruling of the court in sustaining objections to the evidence offered tending to impeach A.J.Miller, and L.A.Miller, his son, who testified to having mailed to appellant the assignment of the claim against the receiver of the Illinois National Fire Insurance Company for the unearned premium paid that company. These pleas to which demurrers were sustained are all designated as pleas of a failure of consideration and purport to be such upon their face. Each of these pleas aver that the consideration for the issuance of the policy was the agreement on the part of plaintiff to assign to appellant his claim against the Illinois National Fire Insurance Company. These pleas aver the facts concerning this agreement and instead of averring that the

consideration failed by reason of a failure of appellee to make the assignment, aver that he never had any such claim and never had filed a claim with the receiver, thus presenting to appellee as an issue on these pleas the question as to whether or not he did file this claim with the receiver, and not whether the claim, if he ever filed one or had one, was assigned to appellant. The failure of consideration alleged by the pleas is a failure to make the assignment as agreed upon to appellant company, the question as to whether he had such a claim against the receiver presented an immaterial issue. If he had no such claim then he owed to appellant the whole amount of its premium. The court did not err in sustaining the demurrer to these pleas. The plea does not in any way aver that no assignment was made of the claim against the receiver, but that no claim was ever filed with him, for return premium due him for the unexpired time on the policy which he held in the Illinois National Fire Insurance Company. The plea avers that appellee had agreed to make an assignment of the claim against the receiver, does not aver that he did not do it, does not aver when it was to be made, but leaves the matter as an executory contract, and although plaintiff may have failed to make the assignment agreed on, which was alleged to be the consideration to appellant, this would not amount to a failure of a consideration; it would, in effect, be only a breach of a promise to perform. Conceding, however, that the demurrer was improperly sustained, appellant was permitted to introduce evidence upon the second trial which could only have been proper under the plea of a failure of consideration properly pleaded, and having had the benefit of this evidence upon that question, it cannot now complain that the demurrer was improperly sustained.

Upon the question of the impeaching evidence offered, appellant offered to impeach the character of A.J.Miller and his son for truth and veracity by showing the reputation of these witnesses at a place where they had resided two years prior to the time of the the facts involved in this controversy. The Court held that this

evidence was too remote, and sustained objections to it; under the ruling in Kennedy v. M.W.A. , 243 Ill., 560., this was error, but upon a careful consideration of this case and from the ruling made by this court upon the former hearing, we hold that appellant was not prejudiced in any way by this ruling, as the record discloses a complete construct between the parties, a loss under the policy and no other judgment could properly be rendered in this case; the judgment is, therefore, affirmed.

A F F I R M E D.

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18#

184 I.A. 272

Gen. No. 85- Oct. Term, 1912- Ag. No. 76-

Filed Oct. 16, 1913-

184 I.A. 272

Charles M. Moran.,
Appellant.,

VS. ; Appeal from Vermilion.

A.B.Dennis., and Oliver Morgan.,
Appellees.

Philbrick, J.

This is an action in assumpsit , brought by appellant against appellees. The facts as averred in the plaintiff's declaration, second count, are, that on the 20th day of October, 1908, W.T.Russell and wife purchased from appellee Morgan a house and lot in Hoopeston, subject to a mortgage of One Thousand Dollars, which Russell and wife agreed to pay. The consideration for the purchase was Twenty-five Hundred Dollars. To secure part of the purchase money a mortgage was executed to Morgan for Four Hundred Fifty Dollars, which was duly recorded in Vermilion County where the property was located. After the execution of the mortgage by the Russells to Morgan, the Russells then sold the property subject to the two mortgages, one being for One Thousand Dollars which they had assumed, the other for the Four Hundred Fifty Dollar mortgage which they had given to Morgan. The Russells sold the property to one Charles M. Moran, and afterwards Moran sold and transferred the property to one Stevens, subject to the two mortgages. The declaration then avers that afterwards Stevens sold the property to Dennis, and Dennis to one Carr, that the deed from Dennis to Carr did not contain the clause assuming the mortgages. That Morgan sold and transferred the Four Hundred Fifty Dollar note to one S.C. Malo, who afterwards put said note in judgment against the Russells who were the principals therein, and that W.T. Russell, one of the makers , was compelled to and did pay this note, and that afterwards Russell brought suit against one Moran, who had as-

sumed the payment of this note when he purchased the property, and that Moran was compelled to and did pay Russell the amount due on the said note. That prior to the payment of the said said note to Russell by Moran, and after the purchase of the said house by the said Dennis, said Dennis demanded and requested of Morgan, the original payee of the note, that he release said mortgage of record, and that the said Morgan did execute a release therefor, which said release was duly placed of record , and that said release was executed by the said Morgan with full knowledge of all the facts, and that he knew at that time that Moran, appellant here, claimed the right to pursue ~~xxxx~~ the said property by reason of the said note and mortgage, as he had the right to do, and that thereafter said Dennis ~~xxxx~~ sold said house and lot to said Carr without providing for the assumption and payment of the said note and mortgage, and that by reason of the release of said mortgage by said Morgan appellant is deprived of his right to proceed against said property and foreclose said mortgage.

The court sustained a demurrer to this declaration, appellant elected to stand by his declaration, and assigns the ruling of the court in sustaining the demurrer as error. This declaration states a good cause of action, and it was error in the court to sustain the demurrer. The judgment of the court is reversed and the cause remanded with directions to overrule the demurrer and to permit defendants to plead to the declaration, if they so desire.

N.B. Schuyler - 2 -

#83

Gen. No. 6001. April Term, 1913. Agenda No. 1.

Filed Oct. 16, 1913.

Otto Hermanson.,
Plaintiff in Error.,

VS. ; Error to Vermilion.

Louis Shaffer.,
Defendant in Error.

184 I.A. 273

Philbrick, J.-

Plaintiff sues defendant for false imprisonment. The facts set out of which this suit arises, as shown by the record, are as follows;- Plaintiff on the 7th of January, 1910 was in the city of Danville, as he contends, taking orders for certain proprietary or patent medicines for future delivery. He was arrested at that time for peddling within the limits of the city of Danville without first having procured a license as required by an ordinance of the city of Danville. He was arrested in the evening, taken to the city prison and there confined until the following morning when he was taken before the police magistrate, where he was fined and required to pay the fine and costs. The officer making the arrest had no warrant, but upon a telephone communication to the police station, a patrolman named Walters went to the part of the city where it was reported that defendant was peddling, made the arrest, and took him to the city prison. Under the facts in this case where plaintiff was found in the city of Danville travelling from house to house with his satchel with bottles and boxes contained therein, apparently in the act of peddling, it was unnecessary that a warrant should be issued for his arrest; ample authority is vested in the police of the city to arrest a person in the act of violating an ordinance without a warrant having been issued therefor. The arrest was made about five o'clock in the evening. Defendant, who was Chief of Police of the city of Danville, did not assist in the arrest, but owing to the lateness of the arrest and the inability to have a trial that evening, directed that plaintiff should be confined in the city prison until the following morning to await his trial.

On the following morning, when the time for trial arrived, plaintiff signed a waiver of a trial by jury, under the provisions of the statute. It is the contention of the plaintiff that the defendant Chief of Police of the city of Danville is liable for false imprisonment because he directed that plaintiff be confined in the city jail until the time of his trial on the following morning.

The record of the Police Magistrate offered in evidence by plaintiff shows the title of the cause, the City of Danville vs. plaintiff; complaint, peddling without a license; fine assessed, Ten Dollars,. That on January 8, 1910, on complaint filed by the City Attorney, charging defendant with peddling without a license; defendant in court signed a waiver of jury, pleaded guilty to the charge, then follows the judgment of the fine of Ten dollars and costs. Defendant had with him at the time of his arrest a satchel containing a bottle or bottles and a box or boxes. The Police Magistrate, H.V. Custer, was placed upon the stand by plaintiff; the Police Magistrate testified that defendant, after standing around, finally said, "I will plead guilty";, and then signed a waiver of a jury trial. Plaintiff had upon his person some money at the time of his arrest, and the amount of the fine and costs was retained by the Police Magistrate out of this money and the balance was returned to the plaintiff. Mary E. Smith, a witness for plaintiff, testified that she bought preparations of the plaintiff, sometimes gave him orders and sometimes did not.

At the close of the plaintiff's evidence, the court sustained a motion to direct a verdict for the defendant, entered judgment on the verdict; and it is from that judgment this appeal is prosecuted.

The errors assigned to reverse this judgment are that it is contrary to the evidence, that there were sufficient facts to require the question of false imprisonment to be submitted to a jury, that the court erred in directing a verdict.

The only question raised by this appeal is whether or not there was any evidence tending to show a cause of action, and want of

reasonable cause for the arrest. If there was probable cause for the arrest and reasonable ground to suspect or believe that the defendant was guilty of a violation of a city ordinance of the city of Danville, then this action will not lie. The rule is too familiar to need citation of authorities that before an action for false imprisonment can be sustained it is incumbent upon the plaintiff to shew that there was no reasonable ground or cause to believe plaintiff guilty of the charge for which he was arrested and for which he was imprisoned. From the evidence the only conclusion that can be arrived at is that there was reasonable cause to believe that plaintiffwas guilty of the charge for which he was arrested; the trial court did not err in directing a verdict for the defendant. Plaintiff himself not only offered the record of the judgment of the Police Magistrate showing that he pleaded guilty to the charge for which he had been arrested, but the Police Magistrate testified that plaintiff was before him at the time, and that he did there plead guilty to the charge. This proof alone will bar a recovery in this kind of an action.

Upon the contention that plaintiff was not given immediate trial upon being taken to the city prison, the city was not bound to proceed with the trial at that hour and had the right to hold plaintiff in custody until the city could be able to secure witnesses and prepare for the trial, and under Section 12, Article 6, Chapter 24, M.R.S., 1909, it was not unlawful to confine plaintiff in the city prison until the following morning to await his trial.

We find no errors in the record, and the judgment of the trial court is affirmed-

A F F I R M E D.-

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4 H A 283

Gen. No. 6014. April Term, 1913- Agenda No. 57

Filed Oct. 16, 1913-

184 I.A. 283

C.E.Hoxworth.,
Appellant.,

vs. ; Appeal from County Court of McDonough County.

Walter Kepple.,
Appellee.

Philbrick, J.

This action was commenced before a Justice of the Peace, where plaintiff recovered a judgment, appeal was taken by defendant to the County Court, where the court directed a judgment for the defendant, from which plaintiff appeals.

Defendant was a tenant farmer and intending to move from the farm which he occupied, prepared for a public sale, the sale was held upon the farm where he resided and was conducted by an auctioneer. Plaintiff bought at that sale some timothy hay and some clover hay, the timothy hay was in the mow of the barn and the clover hay was stacked under a roof in the yard. It was represented at the sale by the auctioneer and by defendant that this hay was choice and first class, and it was announced that the hay had been measured by disinterested parties and that there was so much hay in the barn and so much in the two bents of clover hay in the yard. Another purchaser at this sale purchased one ton of the timothy, and he was to have the first ton, he removed his hay leaving the balance for the plaintiff, plaintiff purchased the timothy hay by the ton, plaintiff paid the defendant $176.07, for the amount of hay represented by the defendant to be in the mow, but now contends that the timothy hay did not hold out to the measurements announced, and that about one ton of the clover hay was so badly damaged that it was unfit for use.

The announcement was made at the time of the sale that anybody desiring to purchase the timothy hay in the mow, if not satisfied with the measurements represented by the auctioneer and defendant,

would be given an opportunity to re-measure the hay; the timothy hay was re-measured by plaintiff before he made payment for it, and he insists by his measurements the amount of hay which he paid for was not in the mow. Notwithstanding this contention by him, and although he had ample opportunity to ascertain the amount of hay there before making payment, he voluntarily settled therefor by paying for the amount represented by defendant, and he cannot now complain that he did not get the full amount paid for.

As to the clover hay, he bought these two ~~ebents~~ one at $14.75- per ton and the other at $14.50- per ton. Plaintiff did not make payment for any of this hay on the day of the purchase, and as he had made arrangements to occupy the farm on which defendant then lived and expected to use the hay upon that farm, he did not remove the same from the farm where it was purchased. After having made the purchase, he went upon this farm with his ~~xxxxxx~~ teams to work and fed and used portions of the hay, both the timothy and the clover, and while so doing he had ample opportunity to make a full and complete investigation of the condition of this hay before paying for it but notwithstanding he had been upon the place with numerous teams and used a portion thereof, he voluntatily paid for the amount of hay as represented by defendant; having had the opportunity to discover its condition but having made payment without so doing, he made a voluntary settlement therefor.

Plaintiff cannot recover under these conditions, not being entitled to recover, it is immaterial whether the trial court committed any error in the trial of the cause or not. The ~~judgxxxxx~~ judgment is affirmed.

A F F I R M E D.

4/17

Gen. No. 6018- April Term, 1915- Agenda No. 10-

Filed Oct. 16, 1915-

184 I.A. 284

C.W. Bryant.,
Appellee-

vs. ; Appeal from Moultrie.

Vandalia Railroad Company.,
Appellant.,

Philbrick, J.-

This is an action brought by plaintiff to recover from the defendant company for services rendered to it as station agent, ticket agent, telegraph operator, etc., at the station of Lovington, County of Moultrie. While plaintiff was in the employ of the defendant he sold to parties at Lovington, as ticket agent of the defendant, three tickets from Lovington, Illinois to Seattle, Washington. The tariff and schedule of rating for these tickets over the various lines of railroad upon which the parties purchasing them would have to travel from Lovington to Seattle was provided in the office of the defendant company at Lovington, from which plaintiff was required to ascertain the prices of the tickets. In examining this schedule of rates and tariff list, in his endeavor to determine the price to be charged for these tickets, plaintiff upon his best judgment arrived at the conclusion that the proper charge for each ticket was $72.50- Prior to the time of making the sale, plaintiff contends that he applied to one Penn, a Travelling Passenger Agent of the defendant company, concerning the correct charge to be made, and insists that Penn, who had authority to direct plaintiff in regard to this matter, informed plaintiff that he would look up the matter when he arrived at Terre Haute, Indiana and would wire plaintiff whether or not his conclusions were correct, and if plaintiff did not hear from said Penn then he

should make the sale in accordance with his own conclusions. Plaintiff did not hear from Penn or receive any telegram, and sold the tickets for the price of $72.50- each. After the sale had been made and the tickets used, it was found instead of the price being $72.50- it should have been $112.49. Plaintiff further contends that after the error was discovered Penn informed plaintiff that he would stand between him and the company for any loss in regard to the sale, the mistake having occurred by reason of Penn's failure to investigate the matter upon his arrival at Terre Haute and to wire plaintiff. After some negotiations, two of the parties who purchased these tickets paid the balance due, the other party refused to make further payment, and the defendant company called upon plaintiff to make good the loss, claiming that he was short in his accounts $39.99; plaintiff refused to pay this amount, or to stand responsible therefor.

Plaintiff ceased to be agent of the defendant at Lovington ,. Plaintiff made written demands upon defendant for the payment of his wages, amounting to $100.71- and served notice under Par. 13, Chap. 13 of Hurd's Revised Statutes, 1909, [J.T.A. 78 S-28] and brought suit for the wages due him before a Justice of the Peace. Plaintiff recovered a judgment before the justice for $100. 71. Defendant appealed to the Circuit Court where judgment was rendered against defendant for $135.00., plaintiff contending that by his claim being for wages due him, he is entitled to recover $35.00 as a reasonable attorney's fee, under Par. 13 of the Statute, supra., The court submitted to the jury the question of the attorney's fee, and the jury returned a gene-ral verdict against defendant for $135.00., upon which judgment in was rendered.

Defendant does not question the right of plaintiff to recover the difference between the amount of his wages, $100.71 and the amount of the loss, $39.99- caused by the sale of the ticket below the tariff rate, but insists that the court committed reversible error in submitting to the jury the questionm of the amount of attorney's fees, in rendering judgment for $135.00-

Upon the contention that the plaintiff is liable to the defendant for the loss occasioned by the sale of this ticket at a price below the tariff rates, the proof shows and it is not denied that plaintiff used his best judgment and every means available for the purpose of ascertaining the rate, and after having consulted with his superior Mr. Venn regarding the same and having availed himself of every means at his command to determine the correct amount of this fare, the loss occurred by reason of an error in his judgment, the mere fact that he made a mistake as agent of the defendant company does not render him liable to the defendant therefor, and the loss, if any, under such condition, must fall upon the defendant.

Schmidt v. Pfau, 114 Ill., 494.

Upon the contention, however, that the court erred in submitting to the jury the question of the attorney's fee, we are satisfied that in this the court was wrong, that the question of the amount due plaintiff for his wages was one for the determination of the jury and before an attorney's fee could be allowed, under any circumstances, it was necessary that the jury should find that the amount due him was the amount demanded of the defendant in the written demand made by plaintiff, and find that the amount was due for labor , wages, etc., W.C.Ex. Co., v. T., 57 Ill., , App., 606, C.W. & V. C.Co., v. Balmer, 45 Ill., App., 60; by returning a general verdict including an attorney's fee, there is no way to determine what amount the jury allowed for attorney's fee or what amount the jury found to be due as wages, and that if the jury had returned a verdict finding that the demand was for the correct amounts, and that the claim was for labor as a servant or labor in the employ of the defendant for wages, then it became the duty of the court to fix a reasonable solicitor's fee and the question of the amount of solicitor's fee was not a proper question to submit to the jury.

Fletcher v. Massey., 49 Ill., App., 38-

Appellant also insists that the judgment is erroneous in the fact that it is for an amount in excess of the demand made before the Justice of the Peace, and endorsed by him upon the back of the summons. This demand was for $100. 71, the amount of wages due, and if an attorney's fee should be allowed, which must be taxed as costs. It was not the province of the plaintiff in making his demand or bringing suit before the Justice of the Peace to fix the amount of the attorney's fee and include it in his demand, he could demand only the amount due him for wages, an this demand must not exceed the amount found to be due upon the trial, if the recovery is less than the demand no attorney's fee can be recovered, but if the demand is found to be correct, then it becomes the duty of the court to fix the amount of the attorney's fee and tax it as costs.

The question contended by defendant that an attorney's fee under the statute, cannot be recovered for an employment of this character is not clear and is not free from doubt. Some of the Appellate Courts of this state have held that under such employment an attorney's fee is proper to be recovered, others that it is not, Epp. v. Epp., 17 Ill., App., 196. We are inclined to the opinion that the statute is broad enough in its terms to permit the recovery of attorney's fees by one employed as plaintiff was.

For the error committed by the trial court in submitting the question of the amount of the attorney's fee to be recovered, if any, to the jury, the judgment ust be reversed and the cause remanded.

Reversed and Remanded.

1913

W. G. Cochran)

General Number 6022 Agenda 13

April Term, A. D., 1913

Filed Oct. 16 - 1913 -
Dec. 3 - 1913 -
R. H. Dietz

Mary Kaminski, Administratrix of the estate of Frank Kaminski, deceased,

Appellee

vs.

Corn Products Refining Co., (a corporation),

Appellant

Appeal from Tazewell.

184 I.A. 286

Philbrick, J.

Plaintiff brings this action against defendant to recover for the alleged wrongful death of her husband. The declaration is in several counts, the substance of which are that the defendant company was in the possession, ownership and control of a wooden box located in a street or public highway of the city of Pekin along and adjacent to the property owned by the defendant company. The declaration in various counts charges that the defendant constructed this box in the public highway in such a negligent and improper manner that plaintiff's intestate who was driving along and upon said public highway with a wagon ran over and upon said box and that by reason of the box extending above the level of the public highway that the wheels of the wagon upon which plaintiff's intestate was riding dropped with great force and violence whereby the deceased was thrown from the wagon which passed over and killed him. One count alleges that the defendant unlawfully and negligently maintained said box in said highway in such a condition as to cause the injury; another alleges that defendant not only installed the box, but since installing allowed it to become and remain in a dangerous and unsafe condition whereby the deceased in driving along said highway ran over

and upon the same and was thrown from his wagon, injured and killed. The trial resulted in a verdict and judgment against the defendant for Seven Thousand Dollars.

The proof discloses that the defendant corporation owned certain property along and adjacent to the highway wherein this box was situated, that the box was built in the highway and that certain pipes from the City Water Works of the City of Pekin laid along said highway to said box and from the point where the box was constructed the pipes were run to the property now owned by the defendant company and supplied this property with water, the box was built in the street for the purpose of obtaining access to the pipes whenever necessary; this box was constructed in this highway by former owners of the property, that after the box was constructed in the street other parties had owned this property before the defendant company had acquired it; that the defendant company did not in any manner have anything to do with the placing, constructing or building of the said box in the public highway, and that since owning the property the defendant company has not in any way repaired or interfered with the construction or location or condition of the box in any manner; that the only connection that the defendant company has had with the said box was to use the water which came upon its premises from the Pekin Water Works through the connection made at this box; that the box had been placed in the street during the year of 1902, that at the time of its construction it was placed below the level of the street and filled over with dirt so that it could not be observed and was not a hindrance or obstruction to the travel along the street, that it was constructed in the middle of the street which was thirty-three feet wide, there was ample room on either side for the passing of teams either way, that on various occasions before the defendant became the owner of the property, rains and water running in the street washed the dirt away from the box and made ravines or holes at or near the sides of the box, that these had frequently been

filled up by persons using the street and at times by the city of Pekin. The facts further disclose that plaintiff's intestate had been hauling brick and teaming upon the streets of the city of Pekin for several years, that he had had occasion to pass this box several times a day while engaged in the work he was doing at the time of his death, he had been for several days hauling brick along this street, that upon the day in question at the time of the injury, instead of occupying that portion of the street which was free from obstruction, and notwithstanding the box extended above the level of the street several inches and was plainly visible, the deceased was riding upon his wagon loaded with bricks with his back to the side of the wagon and paying no attention whatever to the position in the highway that his mule team was taking, and that by reason of this the team wandered upon the box and when the wheels struck the box and dropped therefrom, the bricks upon the front end of the wagon began to fall scaring the team by reason of which they ran away and plaintiff's intestate fell from the wagon and was run over and killed.

Defendant insists that the judgment is wrong and should be reversed because it is contrary to the evidence, because there is no negligence shown on the part of the defendant and that plaintiff's intestate was guilty of contributory negligence.

The only theory upon which this action can be maintained against the defendant, if at all, is upon the theory that the maintaining of the box in the public highway for the use of the defendant company was a public nuisance, and that it was its duty to abate it, and in failing to do so it was negligent, [illegible] the defendant can be held liable for continuing a nuisance [illegible] remember the law requires that a demand [illegible] upon the defendant company to abate the nuisance.

[illegible] v. Adamowski, 154 Ill., 51

[illegible] v. McIntosh, 140 Ill. App., 13.

~~No demand to abate a nuisance was made and there is no proof of any demand having been made.~~

The law [redacted] required that the deceased while in the use of the public streets should have been in the exercise of due care and caution for his own safety, commensurable with the known conditions, and the evidence disclosing that he knew the condition of this box, the deceased having passed it several times a day for several days prior to the accident in going to and from the place where he was hauling the brick, he must be held to have had knowledge of the condition thereof.

In driving along the highway without paying any attention to where he was going, without giving any attention to the direction of his team, sitting with his side to the front of the wagon, and knowing the condition of the highway over which he was passing, he was guilty of such contributory negligence as will bar a recovery.

It was the duty of the trial court to have given the instruction asked for by the defendant to direct a verdict for the defendant.

For the reason that no judgment can be maintained against the defendant upon the facts in this case or the law applicable thereto, the judgment must be reversed.

The Clerk will enter in the judgment of this court the finding of fact that [redacted] tiff's intestate was not in the exercise of due care and caution for his own safety at and before the time of the injury. The judgment is reversed.

Reversed.

T. A. Green

Gen. No. 6023- April Term, 1913- Ag. No. 73-

Filed Oct. 16, 1913-

William J. Jones.,
Appellee-
VS. ; Appeal from Macon.

Cincinnati, Hamilton and Dayton
Railway Co., a corporation.,
Appellant.,

184 I.A. 287

Philbrick, J.-

Plaintiff was a passenger upon the defendant's railroad from Decatur to Camrago, Illinois, he had a trunk with him as baggage. The train upon which plaintiff travelled arrived at Camargo at about five o'clock p. m. on the 20th day of December, at that time it was dark and plaintiff informed the station agent that he would get his trunk on the following mprning, to which the agent replied, "All right". The trunk was placed in the depot by the defendant, during the night the depot was broken into, the trunk rifled and the contents taken. Plaintiff below recovered a judgment for $58.55, from which defendant appeals.

There are two questions raised upon this record, one as to the liability of the defendant for the loss of the goods, the other the question as to whether plaintiff is entitled to recover for the loss of the contents of this trunk to the amount of the judgment.

It is conceded by defendant that it was required to use due and ordinary care for the protection of the property and trunk of the plaintiff and that if it did so it is not liable unless the proof shows it was guilty of gross negligence in that regard. The proof shows that the trunk was placed in the depot where it was at the time the station agent left the dppot. The door into the waiting room of the depot was locked by a night lock which was operated from the inside of the room, a door of the ticket office which opened into this waiting room was also locked, but a door leading from the waiting room into the baggage room where

the defendant contends the trunk was placed by its agent was not locked. Access to the trunk was gained by entering the ticket office, thence into the waiting room and then to the baggage room.

The jury was properly instructed as to the care required to be exercised by defendant in the keeping of this trunk, and there being no dispute as to the evidence as to the time when the trunk arrived at the station, in calling for the trunk upon the following morning, plaintiff called for it within a reasonable time. The question as to whether or not the defendant used due and ordinary care in placing the trunk in the baggage room without having locked that room was for the jury to determine, they found that issue against the defendant by their verdict, and we are not prepared to say that it was clearly and manifestly against the weight of the evidence, or is not warranted by the evidence; consequently, it will not be disturbed by this court.

The evidence discloses that plaintiff had formerly resided in Camargo, Illinois, that he had been for some time working at Decatur, that his wife was dead, that he had some granddchildren at Camargo; he had worked during the summer near Decatur, on his leaving Decatur to return to Camargo he put in his trunk all of his wearing apparel, together with such personal- property as he had or was used by him, he also bought several more articles and trinkets in Decatur for his grandchildren,,these were of no considerable value, and plaintiff was moving all his effects from Decatur back to his former home in Camargo, he placed these articles purchased by him in Decatur in this trunk; he also had in the trunk a small amount of jewelry which had formerly belonged to his wife. At the time that he went to Decatur he apparently took with him all his effects from Camargo to Decatur, they were carried in his trunk and on returning back to his home he carried them in the same manner. While ordinarily jeweley and merchandise placed in a trunk and not used or needed by the passenger for the purpose of his journey or for his own personal use or comfort cannot be recovered, the evidence does

not disclose that the packing or carrying of these articles in the trunk was done with any intention to defraud anybody or to take advantage of appellant while plaintiff was travelling over its line of road, that the amount of baggage carried by him was within the limit permitted by the company, and we are not prepared to hold upon the evidence in this record that the contents of the trunk of the plaintiff were not necessaryfor his ordinary and usual use and comfort, wherever he might choose to go, and we think that the jury rightfully gave him a verdict for the contents of this trunk, and that there was no error in rendering the judgment on that verdict. It will, therefore, be affirmed.

A F F I R M E D.

1713—

W. C. Johns. Jeorge

184 I.A. 297

Gen. No. 6038- April Term, 1913- Agenda No. 25-

Filed Oct. 16, 1913-

George H. Lovekamp,
Appellant.,

VS. ; Appeal from Macoupin.

John T. Cummings.,
Appellee-

184 I.A. 297

Philbrick, J.-

This is an action brought by appellant against appellee for damages alleged to have been sustained by appellant by reason of the alleged failure and refusal of appellee to complete and fulfil an alleged contract of sale of a farm owned by appellee and claimed by appellant to have been sold to him upon a contract of purchase.

The transaction grows out of a desire of appellant to purchase a farm; he went to Richards and Sparkman at Litchfield, Illinois, they took him to see the farm owned by appellee. Richards and Sparkman did not have the farm for sale and were not representing appellee in any manner, but after having taken appellant to see the farm they wrote appellee and asked him if the farm was for sale, appellee replied that he would sell the farm which consisted of two hundred acres for the price of Nineteen Thousand Five Hundred Dollars net to him; ----- this is shown by correspondence had between Richards and Sparkman and appellee. Richards and Sparkman communicated this fact to appellant, Richards and appellant went to St. Louis where appellee lived to confer with him ~~xxxxxxxxxxx~~ regarding the sale, and appellee then agreed to sell the farm upon the terms and conditions stated in this correspondence with Richards and Sparkman. Appellant returned to Litchfield with Richards and there they entered into an agreement for the sale and purchase of this property, , the contract was signed by appellant and by Richards and Sparkman as agents of appellee. The terms of that contract did

not meet the conditions and requirements contained in the offer of appellee to sell his farm; one of his propositions of sale was that the sale should ~~xxx~~ net him Fifteen Thousand Five Hundred Dollars, in the contract signed by Richards and Sparkman, claiming themselves to be agents of appellee, they contracted that appellee should pay a ditch tax levied upon a ditch about to be constructed for which an assessment had been levied against this property; the cpntract also provided that the sale and payments should not be made until the following March although this contract was made in September. As soon as appellee discovered that Richards and Sparkman had executed the contract as his purported agents he repudiated the contract and refused to perform it, insisting that it was not according to the terms which he had made and that Richards and Sparkman were not his agents and had no uthority to execute a contract for him.

The cause was ~~xxxx~~tried twice in the lower court, the first trial resulted in a verdict for the plaintiff. This verdict was set aside and a new trial granted, upon the second trial it was agreed by and between the parties that the reporter who took the evidence upon the first trial in short hand should transcribe his notes and the cause should be submitted upon the second trial upon this record to the court without the intervention of a jury which was waived by both parties. The trial court found the issues for the defendant and rendered judgment upon his finding. No propositions of law were submitted to the court to be passed upon by it and no questions of fact submitted to be found by it. It has beenrepeatedly held by this court and the Supreme Court that where a cause is submitted to the trial court without a jury to be determined by the trial court, where no questions of law or fact are submitted to the court to be passed upon by it the record preserves no questions to be passed upon by the court to which the appeal may be taken or the writ of error prosecuted.

Freeport v. Orr, 171 Ill., 205, and cases cited at Note 5, page 751, 8 Ill. Cyc. Dig.

For the reason that there are no questions preserved in this record to be passed upon by this court, the judgment is affirmed.

A F F I R M E D.

1745

J. G. Crichton, Esq.

487

General Number 6063 Agenda 43

April Term, A. D., 1914

Filed Oct. 16, 1913-

Alex Hamilton and Marie Hamilton, Partners,

Appellees

vs

Carle Thompson,

Appellant

184 I.A. 316

Appeal from Menard

Philbrick, J.

Appellees lived upon a farm in Menard County, a short distance from this farm and across the highway appellant resided. Appellees were engaged in raising turkeys for market and had secured some valuable stock, during the season of 191.., they hatched one hundred and fifteen turkeys and succeeded in raising about one hundred and eleven of them until July first; at about this time the turkeys began to wander away from the farm of appellees and trespass quite extensively on the surrounding country, including the farm of appellant. Turkeys soon began to disappear, and some would come home at night badly bruised and crippled. For one turkey hen which was killed or died appellees had paid fifty dollars. Appellees lost in all about seventy-four turkeys. They brought suit

against appellant for their loss, and recovered a judgment against him for Two Hundred and Eighty-five Dollars; and appellant, feeling that he has been grievously wronged by reason thereof, prosecutes this appeal.

The only question involved in this case is one of fact; the law has been properly applied, and the jury correctly and fully instructed upon all questions of law involved, by its verdict the jury has determined the questions of fact against appellant, and unless this court can feel warranted in saying that the verdict is clearly and manifestly against the weight of the evidence it should not be disturbed.

Upon a careful examination of the evidence in this case we find that the proof is that appellees had engaged quite extensively in the riasing of turkeys, they had selected a particular breed and had paid as high as fifty dollars for some of the parent stock, that during the season of 1912 something like one hundred and fifty turkeys had been hatched, and after they had grown to weigh from three to five pounds, they began, as is shown to be the custom of the turkey, to wander away from home during the day foraging and

returning home at night to roost. The evidence further discloses that there had been some controversy and dispute between appellees and appellant regarding the trespassing of these turkeys upon appellant's farm, and the evidence discloses that appellant had at least at one time said that he would kill those turkeys if they did not keep off of his place. He now insists that this was mere talk, and he never intended to do as he said. The evidence further discloses that on one occasion two persons driving past his place saw him throw a club at one of the turkeys which was upon the limb of a tree at his place. A number of the turkeys that disappeared from appellees' flock were found lying dead in the highway along the fence of appellant's farm, and some were found dead on his farm, and he had notified appellees that they must not permit their turkeys to trespass on his land. The evidence does not disclose that any serious damage was done to appellant's farm or to the crops thereon by reason of the trespassing turkeys, but he contends that by reason of their trespassing he had the right to drive them off from the place, while this right must be conceded to him as a matter of law, the mere fact that the turkeys were trespassing

on his place gave him no right to kill or injure them.

From the evidence in this case we are satisfied that the jury was warranted in arriving at the conclusion they did, and returning a verdict against appellant, and that the verdict is warranted by the evidence.

City of Alton v. Wolf,106 Ill. App., 576.

The court did not err in rendering judgment, and there being no reversible error in the record, the judgment is accordingly affirmed.

Affirmed.

Apr Term 1913

Hamilton
vs
Sampson

aff

Thilbrick

April Term
1913

Guy Williams J.

184 I.A. 321

491

General Number 6069 Agenda 70

April Term, . ., 1913

Filed Oct. 16, 1913-

184 I.A. 321

Town of Georgetown ex rel Eugene Quartier,

Appellant

vs

Appeal from Vermilion

Oscar Mc Corkle, Libbie Mc Corkle,

Appellees

Philbrick, J.

This is an action brought by Eugene Quartier in the name of the Town of Georgetown in Vermilion County against defendants for the obstruction of an alleged public highway. This case was before this court upon a prior hearing, and a judgment in favor of the defendants was reversed upon errors of law committed by the trial court upon the former trial. The cause was remanded to the Circuit Court for another trial, and another jury returned a verdict in favor of the defendants, upon which judgment was rendered, and from which the relator appeals.

The highway which it is alleged has been obstructed by defendants is claimed to exist starting from a point on the south line of Section 5, Town 18, North, Range 11, East of the 3d P.M. Vermilion

County. A public highway runs along the south line of Section 5 and it is contended that the alleged public road which has been obstructed is on the quarter section line between the east and west half of the south east quarter of said Section 5, extending from that point north about a quarter of a mile and from there it angles off and leads to a cemetery and a slaughter house, the slaughter house being owned and operated by the relator upon land which he leases from one Snooks. This road is claimed to exist by reason of prescription, there being no contention that any road exists or one was ever laid out in any other way. As far back as the early fifties it seems there was a lane opened from this point on the south line of Section 5 extending north. This lane as originally opened was not on the quarter section line but lay to the east of it. A short distance north of the highway on the south of the section a couple of residences were standing, one on the east eighty and the other on the west, and this lane was opened first for access to these residences. The evidence is conflicting as to whether a gate was maintained at the entrance to this lane where it opened off from the public highway on the south of Section 5, but the evidence discloses that at various times during all of

the time that this public road is claimed to have existed a gate or bars had been maintained at this place. After this land which was of no definite width extended north about eighty rods it then ceased to maintain any general direction, part of the time people travelled on the west of it through the pasture, part of the time to the east of it through the pasture, and no demarcation of any line of travel was ever maintained from that point on. To the north of this eighty rods, back in the early forties and fifties, there were several houses together with a school house located somewhere on the west eighty of the quarter section, but it also appears that the school house at one time was located over on the east eighty nearer to the east line of the section. There has been no residences around this place for fifty years excepting one that is now occupied by a negro family. The location of the town of Westville a short distance from this place was the cause of the vacating of all these residences. But it is insisted by relator that notwithstanding this fact this road was always maintained or kept open as a public highway for the use of any person desiring to use it, But the evidence discloses that while

people use this lane at the south end at some point along this lane bars were kept or maintained most of the time, after reaching a point about eighty rods north of the south line of Section 5, travel then was deflected to the west to reach the residence occupied or owned by one Black at that time; the territory, both on the east and west side of this quarter section line, was open timber and parties travelled in all directions through it, both to reach the school house and the cemetery, and they were not confined to any specific line of travel. That the cemetery was located along a ravine and that it was necessary to cross this ravine when going through this lane to reach the cemetery, but that instead of doing so in a public highway, one of the residences in the neighborhood was used as a stopping place, and all corpses were carried from this residence across the ravine to the cemetery.

We are satisfied that the verdict of the jury is fully warranted by the evidence, and two juries have passed upon this question, and the last one by consent and agreement of the parties having visited the surrounding conditions and examined the alleged highway, have found against the contention of the relator, and we find no

reason for disturbing their verdict upon the facts as proven.

Appellant insists, however, that the court erred in permitting it to be shown that there was another highway or public road by which access might be gained to this cemetery, while this testimony was wholly immaterial and should not have been permitted, the error has not prejudiced the relator, and he has not been injured by its admission.

Finding no reversible error in this record, the judgment is affirmed.

Affirmed.

Apr Term 1913

April Term
1913 –

Town of Georgetown
ex rel Quarter

25
M C Carlile
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Aff

H. B. Schneider

Philbrick

184 I.A. 322

Gen. No. 6074- April Term, 1913- Agenda No. 49-

Filed Oct. 16, 1913-

George Heyen, William Heyen and Albert Heyen., Partners doing business under the firm name of Heyen Bros.,
Appellee-

vs. ; Appeal from Macoupin.

Cleveland, Cincinnati ,Chicago and St. Louis Railway Company.,
Appellant.,

Philbrick, J.-

Plaintiffs were assignees of a car load of cattle shipped from East St. Louis to Gillespie, Illinois over a line of the defendant's railroad; the shipment was made by Smith Brothers and Sparks, who were brokers at East St. Louis, plaintiffs herein were feeders of cattle, and the cattle were bought by them for feeding purposes. The cattle were loaded in the cars of the defendant company at East St. Louis late in the afternoon of February 20, 1912- they were taken from the yards at one-thirty A.M., on the morning of February 21st, on the first available train. From the Brooklyn Yards at East St. Louis to Gillespie is about forty-five miles, the cattle arrived at their destination at about three-fifty-four p.m., on the afternoon of February 22d., having been on the road thirty-eight hours, the schedule running time of this train from the yards at East St. Louis to Gillespie was eight hours. At the time or soon after the cattle were loaded in the cars at the Brooklyn Yards at East St. Louis a snow storm began and it was snowing and storming at the time the train started from the yards at East St. Louis at one-thirty a.m. on the morning of the 21st- This term after raging for some hours resulted in one of the severest snow storms and blizzards ever known in that section of the country . The train proceeded upon its journey, however, with fairly good

progress until it passed a station known as Bunker Hill, after leaving Bunker Hill, the train encountered a snow drift in which the train was stalled, and could proceed no further until it was shoveled from this drift; after sufficient snow had been removed, then with additional engine power the train proceeded on its journey. During the time that this storm was raging and after the train was stalled in the drift after leaving Bunker Hill, the snow drifted so that it was impossible to make any progress toward removing the snow as it drifted in as fast as it could have been shoveled out, until after the cessation of the storm. There is no complaint of any unreasonable delay of the train before it left the yards, there is no negligence attempted to be shown in the movement of the train from the time that it started from the Brooklyn Yards in East St. Louis until after it passed Bunker Hill, but it is insisted by the appellees that the storm was of such a character that the defendant company should have known that it could not proceed further after reaching Bunker Hill, and that the defendant company was negligent in not unloading the stock at Bunker Hill, and it should be held to be guilty of negligence in attempting to proceed further with this stock. There having been no unreasonable delay of the train up to that time, and there being nothing in the record to disclose or show that the defendant had any knowledge that the train would become stalled or had any reason to believe that it would be stalled by reason of the snow storm, it cannot be held guilty of negligence for failing to unload the cattle at Bunker Hill. After the train became stalled in the snow, it was then impossible to either unload or move this stock. The record discloses that this storm was of such a character as not to have been reasonably anticipated, and it must be held to have been an act of God for which the defendant company is not responsible.

Sandy v. Lake St. E.R.R. Co., 235 Ill., 194-

2 Hitchinson on Carriers, Sec. 913-

Tate v. Mo. Pac. Ry. Co.,157 Ill. App.110.

Walk v. P.C. & ST.L. Ry. Co., 162 Ill. 545-

It is unnecessary to pass upon any other points raised upon this record. The judgment is reversed and the Clerk will enter in the judgment in this court the finding of fact that the delay which resulted in injury to this shipment of cattle was caused by an act of God, and that the defendant is not guilty of any negligence in handling this shipment of stock.

Judgment Reversed.

1913—

Gen. No. (407). April Term, 1913- Agenda No. 52-

Filed Oct. 16, 1913-

184 I.A. 324

Frank W. Wood.,
Appellee.,

VS. ; Appeal from Edgar.

A.W.Slaughter, et al.,
Appellants.

Philbrick, J.-

This is an appeal from a judgment rendered in the County Court of Edgar County. The case was originally brought before a Justice of the Peace of Edgar County, from there appealed to the County Court. Before the Justice of the Peace, plaintiff recovered a judgment, defendant appealed to the County Court, upon the trial in the County Court, judgment was also rendered against the defendant. From that court a writ of scire facias was issued to make the sureties who signed the appeal bond with the defendant upon his appeal to the County Court parties to the judgment rendered against the principal debtor. Upon the hearing on the writ of scire facias issued out of the County Court against the sureties on the appeal bond, judgment was rendered against the sureties and they were made parties to the judgment in the County Court against the original defendant. A motion was made for a new trial and overruled, a motion in arrest of judgment was made and ~~xxx~~ overruled, and appeal prayed to this court. The prayer for an appeal was allowed upon filing a bond in the sum of Two Hundred Dollars and bill of ~~xxxxxxxx~~ exceptions within sixty days. The appeal bond was filed within the time required, but no bill of exceptions appears to have been presented to the County Court and there is no bill of exceptions in the record, neither is there any assignment of errors on the record.

For the reason that no bill of exceptions was filed and no assignment of errors made upon or attached to the record, there is nothing preserved for the determination of this court, and the appeal is dismissed.

Appeal dismissed-

$$-\frac{1}{2}\left(\frac{dv}{dx}\right)^2 + \frac{mv}{x} + \frac{dv}{dx} - \frac{\Phi}{2} - \frac{\Phi^2}{2} = 0$$

1713

184325

Gen. No. 6003- April Term, 1913- Ag. 54-

Filed Oct. 16, 1913-

184 I.A. 325

Gertrude N. Kelsey.,
Appellant.,

vs. ; Appeal from DeWitt.

Frank M. Palmer.,
Appellee-

Opinion by Thompson, J.

This is an action of forcible detainer brought by Gertrude N. Kelsey, against Frank M. Palmer, before a justice of the peace. The justice rendered judgment in favor of the plaintiff for possession of the premises and for five dollars rent for. An appeal was taken from the judgment of the justice of the peace to the circuit court. In the circuit court the case was tried by the court without a jury and judgment rendered in favor of the defendant. The plaintiff appeals.

The appellee owned a tract of land in the city of Clinton, composed of several lots and a parcel described by metes and bonds, in all a little over half a block. A large two story residence stands about the center of the tract. The main part of the residence stands on the west half of the premises and the east part of the house, an "L", is on the other half, but the line between the east and west halves of said premises had never been located by a surveyor. The appellee, who lived in the residence, executed a mortgage on the west half of the premises to appellant. The mortgage was foreclosed and a master's deed was made conveying the mortgaged premises to appellant. After the deed had been made under the foreclosure proceedings, the appellant by a constable served a written demand on appellee for the possession of the west half of the premises:- the part she had secured title to under the foreclosure sale. The appellee after the deed was made moved out of the main part of the house, and continued to occupy and live in the "L" that is on the tract still owned by him. Appellee testified that he has not occupied the west part of the house since the suit was begun, and

that when the demand for possession was served on him, he told the constable "To tell Mrs. Nelsey to come down and help herself"--"to whatever belongs to her", and when the summons was served he told the officer the same things. The officer who served the demand for possession testified that appellee said to him, "Why don't you come and get it"? "Tell the lady to come and take her part", and that when the summons was served that appellee made the same statement.

The only evidence tending to show any person was in possession of the west half of the premises, when the notice was served, is that the constable saw some cows and calves on the premises, and that appellee was residing in a part of the house, but he did not know which part. The evidence sustains the finding of the court that the appellee was not guilty of forcibledetainer after the demand for possession was made on him.

Between the time of the trial in the justice court and the trial in the circuit court the appellant sold and conveyed her interest in the premises to a third party. Appellee contends that this is also a defence to the suit and the court so held on propositions of law. The authorities are contrary to this holding. Bell vs. Brunt, 30 Ill. App., 300; Patterson vs. Graham, 40 Ill. App., 399, affirmed in 140 Ill., 531; Doggett vs. Hench, 41 Ill., App. 405; Hickox-vs. Armstrong, opinion 3d. Dist. filed about April 15, 1913,. This ruling however did not harm appellant since the clear preponderance of the evidence is that appellee was not guilty of a forcible detainer.

The judgment is affirmed.

A F F I R M E D.

Gen. No. 6010. April Term, 1913. Agenda No. 6.

Filed Oct. 16, 1913.

184 I.A. 338

John Replogle,
Appellee,

vs. ; Appeal from Coles.

Toledo, St. Louis and Western Ry. Co.,
Appellant.

Thompson, J.

This is an action on the case, brought by John Replogle against the Toledo, St. Louis and Western Railway Company to recover damages for killing a horse on the 19th day of February, 1912, and a sheep at another time. The declaration contains several counts and avers in the first a failure on the part of the defendant to maintain fences, and in others a failure to construct and thereafter maintain at a road crossing, cattle guards suitable and sufficient to prevent cattle, horses, and sheep from getting on its railroad as required by the statute. The defendant filed a plea of the general issue and a plea of set off. On a trial before a jury, a verdict was returned in favor of plaintiff assessing his damages at $187., composed of $155 for the horse, $7. for the sheep and $25. attorney's fees, on which judgment was rendered.

The evidence shows that the horse was killed by a locomotive of appellant going east about two o'clock in the morning of the 19th day of February, 1912. The evidence of the engineer in charge of the locomotive is that the night was moonlight, and that the locomotive did not strike the horse, but that he saw three horses running from the south on the highway, which crossed the railroad, in an attempt to cross the railroad and that the horse that was killed ran into the back end of the cylinder on the side of the engine, and was knocked up against the running board of the engine ten or twelve feet above the ground, and broke the running board and a test plug thus damaging the engine. The engineer, fireman and foreman of the roundhouse testified that there was hair and blood on the running board of the engine the next morning and none on the pilot.

The appellant and two other farmers testified, in substance, that the dead horses was found ten or fifteen feet east of the east line of the highway, that the horses had come along the highway to the railroad and the horse that was killed had wandered west on the railroad a distance of about four telephone poles, where it had whirled and run east along the track to within sixty -or one hun-dred feet of the crossing, where its tracks stopped; that the tracks were measured and corresponded with the measurement of the feet of the horse that was killed; that there were only the tracks of one horse in that direction, but tracks of the other horses were east of the highway on the right of way; that the horse had been hit in the "runkers" and the left hip smashed and that there were no bruises in front of the hip or on the shoulder or neck. The proof shows that there were no cattle guards whatever at this road crossing. It is not contended that appellant was not liable for the killing of the sheep. The testimony of the engineer is that it was moonlight at the time; the callendar shows it was not moonlight at the time the horse was killed. It was a matter peculiarly within the province of a jury to find the facts from the conflicting evidence.

It is insisted by appellant that the court erred in refusing an instruction stating, that if the horses of plaintiff were running at large upon the highway and that one of said horses ran against the locomotive, thereby damaging it, then the plaintiff would be liable for whatever sum if any the evidence shows said locomotive to have been damaged. If the locomotive was damaged by the horse running against the side of the locomotive as claimed by the appellant, then the damages resulting therefrom were not a matter of set off, in a suit to recover damages for negligently killing the horse and sheep.

The nature of demands to which set off may be pleaded is controlled by statute, Leathe vs. Thomas, 210 Ill., 346.

Under the statute (Hurd's) Stat. 1911, Chap. 110. Sections 37 and 47) demands upon simple contracts may be set off against demands upon sealed instruments, judgments or decrees, and the defendant in any action brought on any contract or agreement having claims or demands against the plaintiff in such action may plead the same. Set off is a proper plea in assumpsit but is not proper in a suit on the case. Zimmaker vs. Rose, 62 Ill., App., 118; Kingman vs. Draper, 102 Ill., App., 577; Spurgin vs. Kruse, 125 Ill., App. 507- There was no error in refusing the instructions. Complaint is also made of some of plaintiff's given instructions but we find no cause for complaint in them.

The judgment is affirmed.

A F F I R M E D.

April Term—
1913—

M. H. Thompson, J.

1849 348

Gen. No. 6021. April Term, 1915- Agenda No. 12-

Filed Oct. 16, 1915-

Ada Switzer, Appellee-

vs. Appeal from Coles.

A.A. Honn., Appellant.

1841 I.A. 348

Opinion by Thompson, J.-

This is a proceeding instituted by Ada Switzer against A.A.Honn, for the partition of some town lots in Humbolt, Coles County, Illinois. The original bill alleged that Mary J. Lewis died leaving complainant, Miranda Martin and Fannie B. Aldridge as her only heirs at law, and that each of said parties became seized of an undivided one third part of said premises; that Miranda Martin and Fannie B. Aldridge with their husbands had conveyed their interests to said Honn; that complainant is seized of a one third interest and A.A.Honn of a two thirds interest in said premises and that A.A.Honn is in possession of said premises and collecting rents therefrom. A demurrer to the bill was filed and thereupon the complainant amended the bill in certain particulars. The defendant then answered setting up that he had in the lifetime of Mary J. Lewis purchased said premises from Mary J. Lewis and that she had executed and delivered a deed conveying said premises to respondent and denying that complainant had any interest therein. The answer also sets forth that Mary J. Lewis left surviving her a fourth child William C. Lewis. The complainant then amended her bill by making William C. Lewis a defendant and alleging that complainant and William C. Lewis were each seized of an undivided one fourth interest in said premises and that A.A.Honn had an undivided one half interest. Defendant Honn answered the amended bill claiming to own the whole of said premises and denying that complainant or William C. Lewis were seized of any interest or entitled to any relief.

Upon a hearing in the circuit court a decree of partition was entered as prayed in the amended bill. An appeal was taken to the Supreme Court where it was affirmed. Switzer vs. Honn, 254 Ill. 621.

After the commissioners , to make partition had reported the premises indivisible the court taxed a solicitors fee of one hundred and fifty dollars in favor of complainant ~~x~~ to be taxed as costs and decreed a sale of the property.

The defendant Monn appeals from that part of the decree allowing a solicitor's fee in favor of complainant to be taxed as costs, and the propriety of that allowance is the only question involved in this appeal.

The original bill did not correctly ~~x~~set forththe interests of the parties. It alleged that complainant was the owner of a one third interest, when as a matter of fact the was only the owner of a one fourth interest for the ~~r~~seasonn she had a brother William C. Lewis who was the owner of a one fourth interest, and whom she neglected to mention in her bill. The defendant Monn also denied that complainant had any interest , and while ~~x~~ he did not succeed in that contention we are not prepared to say he did not make that contention in good faith. It appears that it was necessary for the defendant to employ counsel in the case, and it was only after the answer of the defendant was filed that complainant amended her bill and properly set forth the interests of the owners of the real estate sought to be partitioned.

The statute provides that in proceedings for the partition of real-estate, solicitors fees shall be apportioned among the parties in interest, where the rights and interests of the parties in the land are properly set forth in the bill unless some defendant shall interpose a good and substantial defence.

It has repeatedly been held that solicitor's fees will not be taxed against defendants, where the original bill omitted necessary parties making it necessary for the defendants to employ counsel to protect their interests. Hartwell vs. DeVault, 159 Ill., 325; McMullen vs. Reynolds, 209 Ill., 504; Mulloy vs. Mulloy,-- 231 Ill., 289; Lenox vs. Shinn, 74 Ill., App. 53; Stollard vs. Mycum, 145 ~~Ill~~ Ill., App. 421. The bill should be so accurate that the parties defendant can safely allow a default to be taken against them . The original bill not having properly set forth the interests of the parties and having omitted a necessary party that part of the decree taxing a solicitor's fees is reversed at the costs of appellee-

Reversed in part-

Gen. No. 6025- April Term, 1913- Ag. 15-

Filed Oct. 16, 1913-

184 I.A. 349

Charles H. Nelson.,
Appellee-

V S. ; Appeal from Hancock.

First National Bank of LaHarpe,
Appellant.,

Thompson, J.-

This is an action on the case begun by Charles H. Nelson against the First National Bank of La Harpe to recover damages for the appropriation of certain corn on which Nelson had a landlords lien for rent. The declaration avers in different counts the leasing of certain real estate by Nelson to Gust Strand; the possession of the leased premises by the tenant; the raising of corn thereon; a landlord's lien for rent for the year 1910, and that the defendant fraudulently took and sold the corn, and collected the price and converted the money to its own use; that the defendant frauculently caused the corn to be sold, collected the price and froudulently converted to its own use; and that the defendant fraudulently took said corn, sold the same and collected the price and applied the same on the indebtedness of the tenant to the defendant. The plea was the general issue with a stipulation that any defence might be interposed with the same effect as if specially pleaded. There was a jury trial, and a verdict and judgment for plaintiff for $826.42. The defendant prosecutes this appeal.

The undisputed facts in the case are that appellee, Nelson, who lives in Pike county, leased 280 acres of land near LaHarpe in Hancock county, to Gust Strand for the year 1910, for a cash rental of $1900. due March 1, 1911,. Strand was indebted to the appellant in the sum of $3676.28- In the fall of 1910, Strand was critically ill and appellant, having no security for this indebtedness, on November 5, 1910, took a note and chattel mortgage due in ninety days on all the property belonging to Strand on the premises, consisting of horses, farming implements, cattle, hogs and 3500 bushels of corn raised on the premises in 1910- On November 19,

Strand, who was sickin bed, acting through his son sold a part of the corn included in the chattel mortgage to grain dealers, who gave him a check for $1566.04 for the corn. The son of Strand delivered this check to appellant with instructions to deposit $266.04 to his checking account and endorse the balance on his note to the bank. This check was applied in that manner. The appellant knew that Strand was a tenant of appellee and that the corn was raised on the farm in 1910. The appellee had no knowledge of the chattel mortgage, the xxxx sale of the corn or the application of the proceeds until January 17, 1911. The son of Strand , who delivered the check to the bank, testified that he told the bank officials that the check was for the sale of corn and the official of the bank who received the check testified that he did not remember what the son told him. The vice-president of the bank a week before the mortgage was given made a trip to the home of Strand to get the mortgage but Strand was too ill to execute it at thattime. The mortgage provides that if the mortgagor sold the corn or attempted to do so, or if a distress warrant should be levied on the corn, the bank should have the right to declare its note due and take possession of the corn and sell it and apply the proceeds on the note secured by the mortgage. Strand was a defendant in the case but died before the trial. The official of the bank who took the mortgage was not a witness in the case and there is no xxxxxx direct evidence as to what arrangements were made, if any, about selling the corn when the mortgage was taken. Appellee testified that after learning that the corn in the crib had been sold he went to the bank to see the mortgage and demanded the proceeds of the sale from the cashier and the cashier replied "we have got our corn on the mortgage that is your corn that is out on the place". The cashier of the bank denies making this statement, but says he told appellee that he could take the corn that xxxxx was there, that the bank had no claim on it.

Appellant contends that because it did not itself remove the corn, but only received the proceeds of the corn when sold, that it is not liable to the landlord, and that the lien of the landlord does not attach until a distress warrant is levied. While the appellee contends that the taking of the mortgage by the bank and the sale of the corn by Strand under the direction or with the approval of appellant with the turning over by Strand to appellant of the check received therefor with the knowledge that the check was for corn raised on the demised premises, and on which it held the chattel mortgage, made appellant liable to appellee for the amount thereof applied on the indebtedness to the extent of the rent unpaid. The statute gives a landlord a lien upon crops grown or growing upon demised premises in any year for the rent that shall accrue during such year, but no specific lien is created or given to any other property of the tenant, Herron vs. Gill, 112 Ill., 247. "Any person who knowingly by purchase or otherwise deprives the landlord of the opportunity of enforcing his lien is guilty of tort, and the landlord has a right of action for the damages sustained. Case is a proper remedy to enforce this liability, but it must appear that the property or its proceeds have been disposed of so that the lien cannot be enforced against either". 24 Cyc. 1267; Mead vs. Thompson 78 Ill., 62.

The chattel mortgage was a lien upon the corn and the mortgagee had the right to recover from the buyer the proceeds of the sale unless they were applied to a prior lien. The lien of the landlord was superior to that of the mortgagee. The mortgagor could have been prosecuted criminally and imprisoned for selling the property without the written consent of the mortgagee. There is no criminal liability for selling the corn and defeating the landlor'd lien. The mortgagee received the check for the corn knowing that it was the proceeds of the corn. The taking of the mortgage from Strand, the sale of the corn and the application of the proceeds knowing of the landlord's lien, the interviews between the sons of Strand and the officers of the bank with all the attending circumstances proved, were facts from which the jury were justified in finding that appellant participated in or authorized the sale of the corn and thereby wrongfully deprived the landlord of the statutory lien.

It is contended that the court erred in overruling the objection of appellant to the admission of the note and chattel mortgage in evidence. The taking of the mortgage was a conditional sale of the corn to appellant. The acceptance of the check of the grain buyer was a ratification of the sale of the corn and a satisfaction of the mortgage to that extent; anything that was done by appellant that tended to a defeat of the lien of the landlord was proper and competent evidence and there was no error in the ruling of the court.

It is also contended that the court erred in giving and refusing instructions.

The third instruction given for appellee and the second and third refused instructions requested by appellant state clearly the theories of the parties to this suit. The appellee's third instruction is;-

"3. The court instructs the jury that this is an action of trespass on the case by the plaintiff against the defendant Bank for alleged fraudulent acts tending to impair the security of the plaintiff's lien on the crops in question for his rent, and, while in such case, it is alleged that the acts were fraudulently done, yet it is not necessary for the plaintiff to prove actual fraud or an actual fraudulent intent. If, from all the evidence, you believe that the defendant Bank and Gust Strand acted together in the making of the chattel mortgage in evidence, and in the sale of the corn in question and the application of the proceeds thereof as a payment upon the indebtedness of the defendant Bank secured by the said chattel mortgage, and that the effect of this was to impair the security of the plaintiff for his said rent by virtue of the statutory landlord's lien, and that in the taking of the chattel mortgage and the appropriation of the proceeds of the said corn in part payment of the indebtedness secured thereby, the defendant bank, by its officers, knew that the said corn was raised on the premises of the plaintiff occupied by the said Gust Strand as the plaintiff's tenant, and made no inquiry to ascertain whether or not the rent had been paid, and no part of the rent for that year was then in fact paid,

and the whole of it has not been paid since; then the above facts of the said Gust Strand and the defendant Bank were fraudulent in law, and the plaintiff is entitled to recover from the defendant in this case a sum equal to the amount of the rent for the said year yet due and unpaid, as far as the same is shown by the evidence".

The appellant's second and third refused instructions are;-

2. "The court instructs the jury that it is incumbent upon the plaintiff in this case to prove by the preponderance of the evidence that the defendant Bank took the corn in question or that it ordered or directed some one else to take the corn for it and it is not sufficient to entitle the plaintiff to recover, for him to prove that the corn was taken by some one else and sold or disposed of, or that thereby the plaintiff was deprived of his landlor's lien for the unpaid rents, in such case the plaintiff cannot recover even though it had been proven that the defendant Bank consented that the corn might be sold by Strand and afterwards received the money from the proceeds of the sale of the corn and applied upon the indebtedness due from Strand to the Bank".

3. "The Court instructs the jury that even though you believe from the evidence that, during the time in which the plaintiff had a landlord's lien upon the corn in question, the defendant Bank took a chattel mortgage upon the corn in question, and that afterwards during the existence of the landlord's lien upon the corn, the corn was sold and the proceeds in part was paid by Strand to the Bank and applied by the Bank upon the indebtedness secured by said mortgage, yet the defendant cannot recover in this case unless you further believe that it has been proven by the preponderance of the evidence that the Bank ordered the corn to be sold, or that the Bank took possession of the corn and sold it and applied the proceeds upon the indebtedness due it from Strand".

The gist of this action is the sale of the corn by the direction or with the approval of appellant with the knowledge that it was corn raised on a farm of which Strand was a tenant of appellee. It was not necessary that there should have been an intent to wrong appellee. All that it was necessary to show, was that the

bank participated in, and acted with Strand in the sale of the corn and that appellant secured the proceeds on which it had a lien that was subsequent to the lien of the landlord. The instruction given for appellee correctly states the law. The appellant's second refused instruction 4 states appellee cannot recover even though defendant Bank consented that the corn might be sold. This instruction was defective in not stating that such facts alone were insufficient to sustain a recovery.

The jury might have believed from the evidence the facts to be as stated in the third refused instruction and yet the appellee be entitled to recover because of a request by appellant for the sale of the corn or an agreement for its sale in advance of it being made participated in by the bank. A peremptory instruction must not ignore any theory upon which a recovery may properly be ~~predicated~~ predicated. The instructions were properly refused because they singled out inconclusive facts as decisive of the case. (Loyd vs. Matthews, 119 Ill., App., 546; Byer vs. Mathes, 120 Ill., App., 50). Appellant's second instruction told the jury that appellee could not recover unless they believed from a pre-pojderanod of the evidence the bank did some fraudulent act with reference to the corn in question which deprived appellee of his lien for unpaid rent. Appellant by this instruction left it to the jury to determine what was a fraudulent act entitling appellee to recover and may not complain of the giving of an instruction requested by itself.
We find no reversible error in the case.

The judgment is affirmed.

Affirmed.

Ernest Hemingway

1913

A 369

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Gen. No. 6041. April Term 1913. Ag. 28.

Filed Oct. 16, 1913.

Joseph J. Winks,
Appellee,

vs.

The Baltimore & Ohio Southwestern Railroad Company,
Appellant.

Appeal from Christian.

184 I.A. 369

Opinion by Thompson, J.

This suit was begun before a justice of the peace to recover a penalty for alleged discrimination by the defendant in the freight rate charged for three cars of corn shipped by plaintiff from Illersville to Chicago, in June, 1909, and for the expense of furnishing six invoices or sheets. An appeal was taken from the judgment in the justice' court to the circuit court where a jury returned a verdict in favor of the plaintiff for $194.30, on which judgment was rendered on September 20, 1912. The defendant appeals.

It is contended that there was error in the admission of evidence. On the trial appellee showed by evidence that appellant charged eight cents per hundred weight in car load lots from Owaneco to Chicago, for wheat and corn in 1908 and 1910. Owaneco is three miles further from Chicago than Illersville. The proof made by appellant showed that there had been no change in rates on grain for five years prior to the time of the trial, and the rates charged on wheat and corn were the same. The appellant also offered the schedule of rates for different articles as fixed by the Railroad and Warehouse Commission, and that the rate for wheat as fixed by that

mission is higher than the rate for corn. This evidence tended to prove discrimination and there was no error in its admission.

Appellant contends that the judgment cannot be sustained on the evidence and that the court should have directed a verdict for appellant. The suit is prosecuted under sections 125, 126 and 128 of Chapter 114 of the Statutes, J+A ¶¶ 8910, 8911, 8914 Section 125 provides, if any railroad shall make any unjust discrimination for the transportation of passengers or freight upon the road or any of the branches thereof, or upon any railroad connected therewith which it has the right to use, the same shall be deemed guilty of having violated the provisions of this act. Section 126 provides that the person so offended against may, for each offence, recover of such railroad three times the amount of the damages sustained by the party aggrieved and a reasonable attorney's fee to be fixed by the court. Grain can be shipped from Millersville to Chicago over appellant's railroad either to Taylorville and thence over the Wabash or to Pana and thence over the Illinois Central. Appellee, who is a farmer, testified that he had shipped corn to Chicago from Millersville by way of Taylorville for several years and that the rate was eight cents per hundred pounds for corn, oats and wheat in car load lots. In 1904, he delivered three car loads of corn to appellant at Millersville to ship to Chicago; that at the time of shipment he had a conversation with the agent regarding the rates and the agent told him the rate was eleven and three tenths cents; that he told the agent he had shipped before at

eight cents and he would not pay the rate asked; that he asked the agent how he was shipping and he said by Pana, and appellee replied he had always shipped to Chicago by way of Taylorville and had only been charged eight cents; that he was turning it over to appellant and he would not pay more than eight cents. The agent of appellant denies the conversation as detailed by appellee, but says appellee told him the rate was eight cents from Taylorville. The evidence also shows that the rate fixed by the Railroad and Warehouse Commission is higher for wheat than for corn, but the rates fixed by the Commission are not conclusive of this case, since it only fixes a maximum rate and the law does not require that railways shall necessarily charge the Commission's rates, but may ship at less rates providing they do not discriminate between shippers. Emmet Richter, who operates an elevator at Owaneco on the line of appellant's railroad, which is three miles further from Chicago than Millersville, testified that he shipped wheat to Chicago over appellant Railroad in 1903, at eight cents per hundred weight; that appellant made no difference in the rates for wheat and corn and that there had been no change in the rates for five years. The proof also shows that appellee was only charged eight cents per hundred weight for corn from Millersville to Chicago since the shipment involved in this suit. Appellant did not introduce in evidence any published schedule of rates, and did not undertake to explain why dif-

ferent rates were charged and collected from appellee or that other parties were charged the rate which was charged appellee in 1909, but made proof by the agent, that he did not know of any other party being charged eleven and three tenths cents per hundred and that there had been no change for five years. While the law requires, in a suit to recover a statutory penalty, that the appellee must prove his cause of action by a clear preponderance of the evidence, we are of the opinion that the verdict and judgment are sustained by the evidence, and the court did not err in refusing to direct a verdict for appellant.

The judgment was entered on September 20, 1912. Appellant on that day prayed an appeal and was given forty days within which to file an appeal bond. The appeal bond was filed and approved September 23, 1912. The statute provides for an attorney's fee for the party aggrieved, in suits to recover damages in this class of cases, and that the court shall fix the attorney's fee. This matter was overlooked by appellee when the judgment was entered, and on November 7, 1912, at the same term of court at which the judgment was rendered, appellee made a motion to set aside the judgment and order for appeal, and for leave to make proof of the value of the attorney's fees. The court heard evidence on the value of the attorney's fees and entered an order setting aside the order for an appeal and allowed an attorney's fee of $40. The appellant excepted to the order and again prayed an appeal, which was allowed on filing an appeal bond in thirty days.

It is contended that the court erred in setting aside the order for the appeal and making the order taxing an attorney's fee as costs. While it is the general rule, that when an appeal is perfected the jurisdiction and control of the court below ceases and the appeal becomes a stay of all proceedings, yet it was said in Briggs vs. Dunne, 163 Ill. 36. "It is a familiar rule and one well understood, that a circuit court may, upon a proper showing during the term at which a judgment or decree is rendered, modify or set aside such judgment or decree. In other words, during the term of court, the court has free power and control over its orders and judgments, and they may be modified or set aside upon a proper showing as justice may require. If the court has power to vacate a judgment or decree during the term it is plain that the order vacating the judgment approving the bond was one within the jurisdiction of the court, and after that order was entered appellant's appeal was at an end unless a new bond should be filed within the time limited by the court". This ruling was followed and approved in the late case of Finkelstein vs. Lyons, 250 Ill. 27. While the motion made by appellee was somewhat informal, the effect of it was to vacate all orders and proceedings subsequent to the entering of the judgment and there was no error in taxing an attorney's fee as costs. The judgment is therefore affirmed.

Affirmed.

~~Leg 24~~

Minks

B. O & S W R R

~~aff~~

T. M. Jett J.

~~Thornton~~

184 I.A. 375

Gen. No. 6045. April Term, 1913- Agenda No. 30-

Filed Oct. 16, 1913-

184 I.A. 375

Frank S. Nash.,
Appellee-

vs. ; Appeal from Shelby.

William J. Eddy, et al.,
Appellants.

Opinion by Thompson, J.

On March 30, 1910, Frank B. Stairwalt of Shelbyville, was the sole owner of an unincorporated insurance business, which was run under the name of the Kaskakia Life Stock Insurance. On that day he issued a policy of insurance to plaintiff for the sum of $1400., insuring an imported Belgian stallion of the value of $1000. in the sum of $1000., and a grade stallion in the sum of $400. The policy was to run one year. The Belgian stallion died of lock-jaw July 31, 1910. On February 15, 1911., Stairwalt sold his insurance business to defendants by a written contract under which the defendants assumed and agreed to pay all legal claims against the said insurance business. This suit was brought to recover the insurance averred to be due by reason of the death of said stallion.

The declaration contains several counts setting up in different ways the conducting and ownership of the business by Stairwalt, the application in writing for insurance, the policy, the death of the stallion, the giving notice of the death, the proof of loss, the sale of the business to defendants, the promise of defendants to pay the claim of plaintiff and the failure to pay the claim. A plea of the general issue and several special pleas were filed. The second plea avers the execution by the plaintiff of an application in writing for insurance; that the plaintiff warranted the stallion to be in a perfectly healthy condition well knowing that the statement was false and that it was made for the purpose of

inducing the issuing of the policy and that the policy was issued relying on said warranty, and that by reason of the premises the policy became void. The third plea avers that in the written application the plaintiff stated that the stallion had not been sick within twelve months proceeding the date of the application, which statement plaintiff warranted to be true, and avers that the stallion had been sick within twelve months proceeding the date of the application, which fact was known to plaintiff and that the policy was issued without notice of the preceding sickness of the stallion and in full reliance on the truth of the statements contained in the application. The fourth plea further avers that the stallion was affected with a disease of a recurring nature called "Summer Sores" of which plaintiff had notice and that through this means lock-jaw was contracted and that at the time of the issuing of the policy Stairwalt was uninformed of said imperfect condition and relied on the warranty, that the stallion was in a healthy condition and free from infection.

The fifth plea avers that plaintiff in the application promised, that during the life of the policy, the stallion should be well cared for, and in case of sickness he should receive the care of a veterinary surgeon or the best care that plaintiff could procure and that this agreement was made a part of the policy, and avers that on July 20, 1910, the stallion became sick and disordered and that plaintiff had knowledge of said condition, and that for ten days next following plaintiff neglected to furnish care, by means whereof the stallion died. Replications were filed denying and also in avoidance of the pleas. On a trial, a jury returned a verdict for $1000. in favor of the plaintiff, on which judgment was rendered and the defendants appeal.

Two defences are attempted to be interposed as reasons why the appellee is not entitled to collect the insurance on the stallion. One is that the appellee had warranted in his application for insurance, that the horse had not been sick within a year prior to

the application, and that he had been afflicted with summer sores and paraphemesis. The other is that he had not been properly cared for after symptoms of lockjaw had appeared.

The policy contains the two following paragraphs: "This certificate is based upon statements made in application for insurance, and we shall not be ~~in~~ liable for loss where it can be conclusively proven that fraud was practiced to obtain said insurance or where property insured was neglected either before sickness or accident or afterwards".

"Property insured by us is protected against loss by death from disease--- when all due care has been taken to save the life of said animal or animals".

Among the questions and answers in the application, Number 13 is "Was the animal or either of them been sick within the past twelve months, if so when and what was the nature of the disease? Ans. No". At the conclusion of the application isthe following;- "I hereby agree that said animal or animals shall be well cared for and not neglected or abandoned or exposed to danger". "I have read the foregoing application, and fully understand the same, and have answered all the foregoing questions, and warrant the truthfulness of such answers, and it is understood that should this application be accepted and policy issued, that it is done solely upon the representations herein named". The policy provides that the application is made a part of the contract of insurance and a copy of the application is attached to ~~it~~ it. "Under the head of false statements, neglect, etc", the policy recites: "It is provided that this certificate is based upon the statemnnts made in the application for insurance, and we shall not be liable for loss where it can be conclusively proven that fraud was practiced to obtain said insurance, or where property insured was neglected either before sickness or accident or afterward".

Appellant contends that the questions and answers were warranties while the appellee contends that they were representations.

In insurance contracts a representation is a statement relating to a material matter and is only required to be substantially true, while a warranty must be literally true. Warranties enter into and are a part of the contract while representations are mere inducements to it. Minnesota Life Insurance Co., vs. Link, 250 Ill., 273 The application while it warrants the truthfulness of the answers xx yet, it concludes, "It is understood that should this application be accepted and policy issued, that it is done solely upon the representations herein named". The language of an application to make the statements therein warranties must be so clearly and unequivocally expressed as to leave the court xx no other alternative, but to construe thestatements as warranties. If the language employed is ambigious and doubtful or if there is another reasonable conxx struction that may be placed upon it and thus avoid the consequences of a warranty, courts are inclined to adopt the latter construction. Minnesota Life Ins. Co., vs. Link (Supra); Moulor vs. American Life Ins. Co., 111 U.S. 335- Continental Life Ins. Co. vs. Rogers, 119 Ill., 474. The application itself stating that should this application be accepted and policy issued that it is done solely upon the representations xxxx herein named, a court would not be justified in holding the statements to be warranties, when the application itself states that they are representations. Globe Life Ins. Asso., vs. Waggoner, 188 Ill., 133. The court correctly held that the statements were representations.

The evidence shows that appellee is a farmer residing near Litchfield; that about the xxxxxxxxx the middle of March an agent of Stiarwalt, named Kirkpatrick, called on plaintiff and solicited the insurance on the horses, but the plaintifff having insurance which did not expire until March 30, nothing was done at the time, except that Kirkpatrick examined the stallion and saw white spots on it

and talked about them. A few days later the written application was made out by Kirkpatrick, he writing the answers in the application which was signed by plaintiff. The stallion had been in a hospital in October, 1909, where it was treated for summer sores and paraphomosis. Plaintiff testified that he told Kirkpatrick, at the time he examined the horse and saw the white spots, about it having been in a hospital and treated for summer sores and that the agent said "that don't amount to anything"?. The agent in reply to questions put by counsel for defendants, whether plaintiff about March 30, 1910, had told him the horses had been in a hospital and had summer sores replied, "yes I think he did.- no, I never had any information that this horse had been in the hospital". "Did he say that to you? No Sir, I think not entirely".

Several veterinary surgeons were called to testify regarding the summer sores and paraphomosis with which the horse had been afflicted. Dr. Bandy testified that he found him in July, 1909, suffering from paraphomosis; that this was a swelling of the gland caused by a blow and that he had no constitutional derangement and would not be considered a sick horse. Doctors, Swain, Bandy and Jenkins testified that a horse suffering with summer sores would not be considered a sick horse in the sense that that expression is ordinarily used. The evidence of the appellee is that about ten days or two weeks before the death of the horse it had been injured on of its hind feet, just at the edge of the hoof by catching it between the door and sill of the barn causing a sore "about the size of a quarter" and he noticed nothing the matter with the health of the horse until the morning before it died. That morning seeing that the horse did not eat as usual he called a veterinarian within an hour. The jury were justified in finding a verdict for the plaintiff for the reason that appellants failed to prove either that the appellee made any material misrepresentation in the application for the policy, or that the horse was not properly cared for after symptoms of the disease which caused its death had appeared. It is unnecessary to discuss the refusal of the court to give the instructions

asked by appellants on the questions of warranty, for the reason that what has been said, concerning the policy and application applies to the questions raised on the instructions.

All the evidence shows that the horse was worth from $1400. to $1900. When the insurance policy was issued appellee gave his note for $91.00. That note has not been paid, but appellants have not filed any plea of set off, hence there was no error in the court instructing the jury that if plaintiff was entitled to recover the verdict should be for $1000.

There being no error in the case the judgment is affirmed.

A F F I R M E D.

1A 396
184 A 386

507

Gen. No. 6057. April Term 1913. Ag. 39.

Filed October 16, 1913.

S. Homer Tolly,
Appellant,

vs.

The Millikin National Bank,
Appellee.

Appeal from Macon,

184 I.A. 386

Opinion by Thompson, J.

This is an action in assumpsit brought by S. Homer Tolly against the Millikin National Bank to recover $1000 claimed to be due as commission for services of plaintiff as a real estate agent. A trial was had before a jury resulting in a verdict for the defendant on which judgment was rendered and the plaintiff appeals.

It is contended that the judgment is against the weight of the evidence. The defendant owned two hundred acres of land near Assumption, Illinois. The plaintiff is a real estate agent residing in Decatur. J. M. Brownback was the cashier of the defendant bank. The cashier of the bank and the plaintiff met one Sunday evening in the latter part of June, 1910, on an interurban car. The plaintiff testified that the cashier told him if he had any one he wanted to show the land to, he could show it at $85 per acre. The evidence shows that the plaintiff knew that other agents were trying to sell the land for the bank and asked for an exclusive agency; this the cashier refused to give and said the man that comes with a buyer first with his money gets the farm. No other terms were fixed at that time.

within a day or two thereafter plaintiff showed the farm to J. S. Perisho, of Charleston, who offered plaintiff $85 per acre. The next day plaintiff told the cashier he could find a purchaser at eighty dollars. The cashier said he could not make that price without the direction of the other officers. Later the same day he told plaintiff that if they could get $80 cash the bank would be willing to let it go at that. The cashier testified that if the farm was sold the bank wanted its money, but would carry $10,000 on the farm at a low rate of interest.

Plaintiff then wanted to know if the bank got the rent for that year how much would be required to be paid down. The cashier told him they would require $1,000 cash down. The plaintiff then wanted the bank to take a note for the $1000, the cashier refused to take a note and plaintiff wanted to know how long he could have to raise the $1000. The cashier told him they had another prospective buyer; plaintiff then asked if the bank would hold the farm for him until the next morning. The other buyer tendered a check and contract the next morning, but the bank held it open for plaintiff all the next day but he did not come in with either cash or a contract and the bank sold the farm to the other party. The evidence shows that the defendant acted fair with plaintiff and plaintiff's own evidence shows that he concealed from the bank and never did disclose that he had an offer of $85 per acre. The evidence sustains the verdict and judgment.

It is assigned for error that the court erred in sustaining an objec-

tion to a question put to plaintiff's prospective purchaser: Were you ready able and willing to complete the purchase of this farm upon the terms you and Tolly had talked over? This question called for a conclusion. The witness should have been asked for the facts and he was thereafter permitted to tell his financial condition and all the attending facts. There was no error in the ruling.

It is also contended that the court erred in giving and refusing instructions. There was no error in the instructions given for defendant and the jury were fully instructed for plaintiff. To review the criticisms made of the instructions would not serve any useful purpose. The judgment is affirmed.

Affirmed.

Tolly

v.

Mechanics Nat Bank

April Term

1913 –

affd

H. C. Johnson J.

184 I.A. 427

Theodore C. WARDEN,
Plaintiff in Error,

vs.

THOMAS McINERNEY,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court to recover for damages to his automobile which he claimed were done by the horse of defendant in error that had run away, because it has been negligently left in Washington Park without being securely fastened, as required by the ordinances of the City of Chicago and of the South Park Commissioners. The case was tried by the court without a jury. During the trial and before a determination of the case by the court, nine propositions were submitted by plaintiff in error to the court to be held as the law applicable to the case. The record here presented recites that "the court refused to mark any of the findings presented by plaintiff either 'held' or 'refused' and declined to act on them". The court then found the issues for defendant in error and entered judgment accordingly.

Section 61 of Chapter 110, R. S., which has been expressly adopted by the Municipal Court as a rule of practice, provides, in part, as follows:

"Upon a trial by the court either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused' or 'held', as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court.*****"

The arbitrary refusal of a court to mark proper

propositions of law presented in time is reversible error. Mann v. Learned, 195 Ill., 502; Western Valve Co. v. Tells, 187 Ill. App., 655.

Several of the propositions presented in this case announced the law to be that proof of the violation of an ordinance resulting in an injury establishes a prima facie case of negligence on the part of the one violating it. They announce a correct rule of law applicable to the case and should have been marked "Held". In the absence of a ruling on these propositions it is impossible for this court to say whether the finding of the Municipal Court that defendant in error was not guilty was based on a finding that the evidence of defendant in error was sufficient to overcome the prima facie case; on a finding that the evidence failed to show a violation of an ordinance, or on an erroneous holding as to the law.

If the case was determined solely on a finding of fact, that finding would have great weight in this court, and the judgment would not be reversed unless we could say that the finding was manifestly against the weight of the evidence.

For the error of the Municipal Court in refusing to mark either "held " or "refused" the propositions of law presented by plaintiff in error, the judgment of that court is reversed and the cause is remanded.

REVERSED AND REMANDED.

184 I.A. 428

ILLINOIS MALLEABLE IRON COMPANY, a corporation,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY, a corporation,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

A teamster of plaintiff in error, driving a team of two horses hitched to a wagon loaded with approximately 8,000 pounds of iron, turned his team across the street car tracks of defendant in error in front of a street car which he saw approaching at a rate of speed from seven to eight miles an hour, near the middle of the block, and not at a street intersection, and variously estimated at from 40 feet to 250 feet distant. The decided weight of the evidence tends to show the car was not more than 60 feet away when the driver attempted to cross the track. The evidence fairly tends to show that the motorman immediately applied all the usual means of stopping the car and also applied what the witnesses call the "reverse", but was unable to entirely stop it until it collided with the wagon and damaged it to the extent that it cost $58.55 to repair it. Suit was begun in the Municipal Court to recover this damage and was tried by the court without a jury. The court found the issues for the defendant in error and entered judgment against the plaintiff in error for costs. We are asked to reverse this judgment upon two theories, both of which are based on a misconception of the law.

It is first contended that contributory negligence

of the plaintiff in an action for negligence is not a defense where the defendant by the exercise of ordinary care could have avoided the injury. The settled law in Illinois is that where the negligence of the plaintiff contributes to the injury he can not recover unless the act of the defendant resulting in the injury is willful. C. W. & V. Coal Co. v. Moran, 210 Ill., 9; C. C. Ry. Co. v. Conevin, 73 Ill. App., 81; Webb v. C. C. Ry. Co., 83 Ill. App., 385; Wierzbicky v. Ill. Steel Co., 94 Ill. App., 400.

It is next contended that the judgment of the trial court must be reversed when it is contrary to the greater weight of the evidence, and that it is the duty of the Appellate Court to carefully scrutinize the evidence for the purpose of determining where the preponderance lies. It is so well settled in Illinois that it ought not to be necessary to cite authorities to support the proposition, that the finding of a jury or a trial court will be set aside by the Appellate Court when and only when it is clearly and manifestly contrary to the weight of the evidence. Donelson v. East St. Louis Ry. Co., 246 Ill., 625; see also about one hundred cases cited in Vol. 1, Ill. Cyc. Dig., page 449, title "Verdicts".

The fact that upon close consideration the weight or preponderance of the evidence would seem to an Appellate tribunal to be contrary to the verdict is not sufficient to warrant a reversal of the judgment. C. B. & Q. R. R. Co. v. Gregory, 58 Ill., 272; N. C. St. R. R. Co. v. Rogers, 85 Ill. App., 316; affirmed in 186 Ill., 346; West Chicago St. R. R. Co. v. Levy, 82 Ill. App., 303, affirmed in 182 Ill., 525.

This rule rests in the sound and familiar principle that an appellate tribunal is not in as good a position to

judge of the credibility of the witnesses or of the weight or convincing force of their testimony as the jury or the trial court before whom the witnesses have appeared and testified. Prather v. Russel, 78 Ill. App., 458.

On the question of contributory negligence the evidence in this case shows without controversy that the driver of the team in question deliberately turned it across the street car track in front of a street car that he saw approaching. There was a conflict in the evidence as to how far the car was from him when he turned across the track. If the testimony of the driver was to be adopted as the truth, the car was from 300 to 350 feet away. If the testimony of the motorman and at least one other witness was correct, the car was not more than 40 to 60 feet away. It was for the court hearing the evidence without a jury to determine whether the acts of the driver at and just before the collision were such as would have been indulged in by an ordinarily careful and prudent person under the same or similar circumstances. The trial court upon consideration of the evidence made a general finding of not guilty. It must be presumed upon this record that this finding was based either on the fact that the evidence failed to show due care on the part of the driver or negligence on the part of those operating the street car. If it failed to show either of these facts, the finding was right. In C. U. T. Co. v. Jacobson, 217 Ill., 104, the Supreme Court said:

"If teamsters, generally, may drive across street car tracks between street intersections knowing that a collision will be inevitable unless the car is stopped, and intending to take precedence over the car and compel those in charge of the car to stop it, the rights of a street car company on its tracks and the general traveling public would be invaded and practically destroyed. The law does not permit one in such a place to drive in the path of a moving street car, relying upon those in charge of the car to stop it and protect him from injury."

In Sumpsell v. Wilkie, 138 Ill. App., 518, the Appellate Court said:

"We know of no case in which it has been held not to be contributory negligence for a teamster to drive upon a street car track between street intersections, knowing that a car is coming towards him on such track and that a collision will occur unless the car is stopped."

In Healy v. C. C. Ry. Co., 163 Ill. App., 393, the court said:

"Even if the conduct of the motorman had been negligent, that would not have excused the deceased from the duty to exercise ordinary care for his own safety, and that he certainly did not do. He saw the car coming toward him at a distance of not more than one hundred feet and at a 'good speed'. He had ample room to stay where he was or drive east on 39th street and be safe. Notwithstanding these facts, he deliberately turned across the track in front of the car, and was injured, as he must have known he inevitably would be, unless the motorman should be able to stop his car in time to avert it.

"The evidence, instead of showing due care on his part for his own safety, shows the most reckless disregard of manifest danger. It would be hard to conceive a state of facts showing more clearly contributory negligence."

An examination of the evidence in this case forces us to the conclusion that the driver of the wagon deliberately drove in front of the car at a time, place and manner that must have made it evident to him that, unless those in charge of the car were able to stop it, a collision would likely result, and that he relied on them to stop it and protect him and the team and wagon from injury. We think a finding that the plaintiff was barred from a right to recover because of the negligence of the driver was fully warranted by the evidence. Neither does the evidence show negligence on the part of those operating the car. On a like state of facts this court, in Healy v. C. C. Ry. Co., 163 Ill. App., 393, said:

"There was absolutely no evidence in this case of anything to indicate to the servants of appellant that the

deceased was about to turn his horse to the south and drive across the track until he started to do so, and then the car was so close to him that it was impossible to stop it in time to avoid the collision. The motorman was not bound to assume from the fact that the horse and wagon were standing near the track, but out of line of contact with the car, that after he had approached so near that it would be impossible to stop the car, the deceased would suddenly turn his horse and attempt to drive across the track in front of the approaching car. Negligence cannot be imputed to the motorman on that state of facts."

In C. U. T. Co. v. Browdy, 206 Ill., 615, the Supreme Court said:

"Neither was the motorman required to assume that when his car was too near the horse and wagon to permit him to stop his car before it would strike the wagon, the appellee would suddenly and without notice drive upon the track. He was only required to operate his car with reference to perils which reasonably might be expected to occur. To require him to run his car with such caution as to guard against unusual or extraordinary perils would be to require him to so operate his car as to prevent the practical operation of the road."

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

285 - 18325.

GUISEPPE RIBANDO,
Appellee,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

184 I.A. 430

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court for $1,999 for personal injuries. Appellee was employed by the Pennsylvania Railroad as a track laborer. On the day in question he was at work on a track known as track Number 4, leading north from the Union Depot, and then being used by appellant in making up a passenger train soon to depart on its regular run from that depot. He was an experienced track laborer and had been for several months working in the same general locality when he was working on the day in question, and was thoroughly familiar with the surroundings. In making up the train the switching crew with a switch engine had pushed into the train shed connected with the depot on track number 4, several passenger coaches, and left them, had then gone out on that track on to another track, and had coupled to two or three mail or express coaches which were also pushed in on this track and coupled to the passenger coaches previously placed thereon. In pushing the passenger coaches in on track 4, and in going out after the mail or express coaches and pushing them in, the switch engine passed over the spot on the track where appellee was working, and in each instance it was necessary for appellee to, and he did, stop his work and step aside to avoid being run over. When

the mail or express coaches were pushed in and coupled to the passenger coaches, the switch engine stopped within 50 feet of where appellee was working. Appellee's work called upon him to stand between the rails to perform it. When the last coaches were pushed in passed appellee, he did not immediately resume work, but stood watching the engine. He knew it must eventually come out over the track where he was working and expected it to do so soon. After watching it as it stood still on the track 50 feet south of him for what he thinks was about two minutes he resumed his work. As he did so, he took a position between the rails of the track on which he knew the engine must run as it came out of the train shed, with his back to the engine. As he worked he was in a bent position with his head the farthest from the engine. Appellee thinks he had been at work about five minutes when his co-laborer called to him to look out, and he saw the engine approaching and within a few feet from him. He jumped in an attempt to get out of the way of the engine, but did not succeed. His co-laborer testified that the engine struck him in the "rump". About the same instant his co-laborer took hold of him and dragged or assisted him from the tracks. In some way not made very clear by the evidence, his leg was broken and he was otherwise bruised. He and his co-laborer both testified that they did not hear the bell on the engine ring, and they both testified the whistle on the engine was not sounded. At least four witnesses for appellant testified that the bell was one automatically operated and that it was constantly ringing from the time the engine started to move out towards appellee until after he was struck. Appellee was in the possession of all his senses. He had good hearing. He was off duty because of the injury from April 8th until July 4th of the same year. He made a good recovery and the broken leg

is as good as ever, except in stormy weather, when it pains him.

There are two counts in the declaration. The first count charges that appellant was negligent in operating its engine at a high and dangerous rate of speed, but it is not contended that there is any proof in support of that charge. If appellee is entitled to the judgment obtained, it must be under the second count in the declaration. That count charges the negligence of appellant to be that the bell on the engine was not rung or the whistle sounded before the engine was started or when it was being run out from the train shed. The manifest weight of the evidence disproves the charge of negligence in that count.

Appellee in the first count of his declaration avers that while he "was working as aforesaid at the time and place aforesaid and was in the exercise of due care and caution for his own safety", he was injured. In the second count he charged in respect to his own due care that "during the time that said locomotive engine remained standing as aforesaid, the plaintiff was working upon said tracks as aforesaid, and was exercising due care and caution for his own safety". The sufficiency of these averments of due care is in no way contested here. It is urged, however, that the proof clearly shows that appellee was guilty of such contributory negligence as to defeat a recovery. The proof shows that trains, cars and engines were being frequently conveyed over and near to the precise point where appellee was at work, and that he knew that at any moment, some of these moving objects were liable to be upon him and crush him to death or seriously injure him, unless he was constantly on the alert. He also knew that the particular engine that pushed in on track 4 the express or mail cars must soon proceed north again and pass over the identical spot where he was working, yet, if his story is to

be believed, he ignored all these known facts and dangers and deliberately and heedlessly placed himself in the direct path of this engine that was not 50 feet away and with his back towards it, taking no precaution for his own safety whatever, and relying entirely on his attention being directed by the ringing of the bell on that particular engine, although other engines with other bells ringing were momentarily passing and repassing him on adjacent tracks, proceeded with his work. Such conduct can only be characterized as negligence of the grossest character and in our judgment was the primary cause of his injury. Under these circumstances he can not, and ought not, to be allowed to call upon others to recompense him for injuries he would not have sustained, if he had exercised the slightest degree of care. Wilson v. I. C. R. R. Co., 210 Ill., 603; C. R. I. & P. Ry. Co. v. Miller, 135 Ill. App., 36; Belt Ry. Co. v. Skazypczak, 185 Ill., 242.

The judgment of the Superior Court is, therefore, reversed with a finding of facts to be incorporated in the judgment of this court.

JUDGMENT REVERSED WITH
FINDING OF FACTS.

FINDING OF FACTS:

We find as ultimate facts to be incorporated in the judgment of this court that appellant was not guilty of the negligence charged in either count of the declaration and that appellee was guilty of contributory negligence that was the proximate cause of the injuries complained of.

299 - 18339.

ETTA B. FRANKLIN, Appellant,	}	APPEAL FROM
vs.	}	COUNTY COURT,
THOMAS M. HUNTER, Appellee.	}	COOK COUNTY.

184I.A.431

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the County Court of Cook County in an action of replevin brought in that court by appellant to recover from appellee two wagons levied on by appellee, a bailiff of the Municipal Court, as the property of one Anna M. Leach, by virtue of an execution issued out of that court on a judgment in that court against her. Rule 19 of the Appellate Court of the First District provides, in part, as follows;

"In all cases, a party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, *****".

"The abstract must be sufficient to fully present every error and exception relied on*****."

This rule does not require the reproduction of the record in haec verba. Neither does it authorize a mere index of the record. It means just what the language implies, viz., that the substance of the record must be given in the abstract in as few words as will convey to the court all the facts necessary for it to know, in order to determine the merits of the errors complained of. The matter contained in the record should appear in the same order in the abstract. If a bill of exceptions is part of the record, there should be something in the abstract to indicate where it begins and where it ends. There should be a certificate of the trial judge at the end

and not in the middle of the bill of exceptions and it should so appear in the abstract. These things are necessary so that the Appellate Court can see from the abstract and without reading the entire record whether the errors complained of have been committed. It has been pointed out again and again by the Supreme and Appellate courts of this state that unless the errors complained of appear from an inspection of the abstract the judgment appealed from will be affirmed. The abstract in this case violates substantially every rule of this court in regard to abstracts. All the abstract shows of the common law record as to what the issues were in the case is the following:

"Declaration of plaintiff.
"Plaintiff's affidavit of Ownership.
"Defendant, Thos. M. Hunter's plea."

That is no more than an index and nothing whatever can be gathered therefrom as to what issues were formed and tried. This so-called abstract where it is more than an index of the record is in most instances an unabreviated copy of it. There is nothing in it to indicate where the bill of exceptions begins, and the certificate of the judge that "forasmuch as the matters above set forth do not fully appear of record", etc., apparently applies to the clerks or common law record as much as to that part of the bill of exceptions that precedes it. Following this certificate of the judge, there is printed in the so-called abstract what appears to be a complete copy of certain papers that are marked "Plaintiff's Exhibit A" and "Plaintiff's Exhibit B", but there is nothing there to show whether the instruments there copied were introduced in evidence or not.

We might well affirm this judgment for want of a sufficient abstract, and perhaps we should do so as a lesson to those who shall prepare abstracts in the future, but we

have concluded to go through the record ourselves and to determine the case on its merits.

The record discloses a declaration in which it is alleged that the defendant (appellee here) on June 7, 1911, unjustly took and has since then unjustly detained the goods of the plaintiff (appellant here) in controversy. It also is disclosed that the defendant filed in the County Court his special plea alleging in apt form that the property in question was, on June 7, 1911, the property of one, Anna Leach; that on that day he was a bailiff of the Municipal Court of Chicago and as such bailiff then and there had in his hands an execution issued on a judgment in said court against the said Anna Leach, and that by virtue of the execution he took the property in question.

If any replication to this plea was filed, it is not preserved in the record. There is, however, a recital in the record that "issue being joined a trial by jury is waived and said cause is submitted to the court for trial without the intervention of a jury." From this recital it must be presumed that a general replication was filed to the plea, and inasmuch as all the other material averments in the plea were admitted on the trial to be true, that the issue tried by the court was whether the property in question was the property of Anna Leach.

The uncontroverted proof shows that the wagons replevied were originally the property of Anna Leach; that she first obtained possession of them in 1904, and that she retained possession of them from that time until appellee took the same on the execution set up in his plea; that on May 4, 1909, Anna Leach executed a mortgage to one, J. W. Leach, on certain personal property, including the wagons replevied, to secure the payment of $3,400; that on May 23, 1909, J. W.

Leach gave to appellant a paper in form a bill of sale of the property, in which paper it is recited that on the very day the mortgage from Anna Leach to J. W. Leach was executed he felt "himself insecure and unsafe", and took possession of the property, and on May 22, 1909, after giving notice, sold the same to appellant for $2,400. These recitals are not evidence of anything as against appellee, and there is no evidence in the record that J. W. Leach ever foreclosed his mortgage or that he or appellant or any one else, except Anna Leach, ever had even momentary possession of the property on May 4, 1909, or May 22, 1909, or at any other time after she first obtained it in 1904, until it was taken from her by appellee on his execution. Appellant did testify that she saw the property on May 22, 1909, at the place of business of Anna Leach, and that she "bought it in" on that day, but neither she nor any one else testified who sold it or by what authority it was sold. Appellant further testified that she "mortgaged it back that same day", and also, "I leased it to Leach". When the paper identified by her as the lease was introduced in evidence, it turned out to be a paper signed by Anna Leach acknowledging that she had leased the property from appellant and setting out in detail the terms of the leasing, but it was not signed by appellant. Appellant also testified that she gave J. W. Leach $2,400 in cash for the property, and that he immediately gave the cash back to her and she gave him a mortgage on the same property purchased, to secure him for the loan of the identical money paid for it, which happens to be the identical amount of the mortgage which the so-called bill of sale recites was foreclosed, because he, as mortgagee, felt himself "unsafe and insecure." On cross examination appellant was asked, "And you gave him a mortgage then, so he passed the money to you and you passed it back to him and took a mortgage -

Is that right?" and she replied, "Yes". Whether the facts are that appellant gave J. W. Leach $2,400 and immediately borrowed it back, or that J. W. Leach gave appellant $2,400 and she immediately gave it back to him, the net result is that J. W. Leach still held a mortgage for the same amount on the same property he did before the transaction with appellant, and that the property still remained in the possession of Anna Leach the same person who had possession before the transaction. The only apparent change in the situation being that appellant claimed to be the owner of the property. Without elaborating further on the evidence, it is manifest that there is no competent evidence in this record, even tending to show that Anna Leach, who concededly became the owner and possessed of the property in question in 1904, ever parted with either the title or the possession of it; that J. W. Leach ever sold it, or that appellant ever bought it, at a mortgage sale, or that she ever had it in her possession. Under these circumstances the presumption must prevail that the ownership of Anna Leach continued and that the property was here at the time appellee took it on execution. The judgment of the County Court was, therefore, right on the record here presented.

Appellant complains that the court erred in refusing to admit in evidence the records and files in a former suit between the same parties in which counsel for appellant claims the title to the same property was involved, and that it was adjudged to belong to appellant. There is nothing in the bill of exceptions in this case to show that the court excluded the offered evidence. This claimed error is, therefore, not presented here for review.

Finding no error in the record, the judgment of the County Court is affirmed.

JUDGES OF [illegible].

336 - 18376.

DUDLEY A. TYNG,
Appellee,

vs.

UNITED MERCANTILE AGENCY, a corporation, P. H. EARLY, President United Mercantile Agency, and E. E. HUGHES, Secretary United Mercantile Agency,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

184 I.A. 433

MR. PRESIDING JUSTICE GRAVES
DELIVERED THE OPINION OF THE COURT.

The "United Mercantile Agency", a corporation, P. H. Early, its president, and E. E. Hughes, its secretary, are the appellants in this case. The by-laws of the corporation contain the following provisions:

"Shares of the capital stock may be transferred by endorsement of the certificate to the secretary for cancellation, whereupon a new certificate or certificates shall issue to the transferee or to his written order*****. The secretary *****shall make all of the transfers of stock in accordance with the provisions of the by-laws,******".

One William C. Bryan held in his name and claimed to own 500 shares of the capital stock of the appellant corporation. A certificate for 200 of those shares of stock was, in part, as follows:

"This certifies that William C. Bryan is the owner of Two Hundred shares of the Preferred Capital Stock of the UNITED MERCANTILE AGENCY of the par value of Ten Dollars ($10.00) each, fully paid and non-assessable, transferable only on the books of the Agency, in person or by attorney, upon surrender of this Certificate, properly endorsed.******"

On the back of this certificate was printed the following blank, to be used in the assignment of the stock, viz.:

"For Value Received_____hereby sell, assign and transfer unto_____
Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint
_____
to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.
Dated_____19____
In presence of
_____ _____"

After this certificate was delivered to Bryan and sometime prior to the commencement of this suit he filled out this blank so that it read as follows:

"For Value received, I hereby sell, assign and transfer unto DUDLEY A. TYNG -- 200 --
Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint
GILBERT NOXON
to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.
Dated November 13th 1911
In presence of
Hans Von Reinsberg W. C. Bryan
William C. Bryan."

He then delivered it to appellee, Tyng. Without other endorsement appellee, Tyng, and Gilbert Noxon, the attorney in fact named in the above endorsement, presented the certificate to the corporation and to its president and secretary, offered to surrender the same and asked that the stock be transferred on the books of the corporation to appellee. This request being refused appellee filed in the Superior Court his petition for a writ of mandamus to compel appellants to make such transfer in accordance with the assignment on the back of the certificate, and sets up the substance of the facts above recited.

A demurrer to this petition being overruled, appellants filed their separate answers to the same.

The answers of the corporation and its president and secretary are, in substance, the same. By these answers appellants admit the issuance of the stock, deny knowledge of the assignment, aver that if such assignment has been made

that it is colorable only, is without consideration and passes no title; deny that Noxon tendered the certificate of stock to the corporation or requested the issuance of a new certificate in lieu thereof to appellee, over the existence of the by-laws above referred to requiring the endorsement of the certificate to the secretary of the corporation, and deny that any such endorsement was ever made. It is further therein averred that Bryan obtained the shares of stock represented by this certificate by false and fraudulent misrepresentations and that the same was issued without consideration, and that the certificate passed no title to Bryan.

To these answers general replications were filed.

A hearing before the court resulted in a finding for the petitioner and an order for a peremptory writ of mandamus directing the transfer on the books of the corporation of the shares of stock to appellee, and the issuance to him of certificates therefor. This appeal followed.

Before a peremptory writ of mandamus can properly issue, the petitioner must show a clear right to have that done which the writ commands.

Before the transfer of capital stock in a corporation will be compelled by mandamus every reasonable requirement of the by-laws must be shown to have been complied with. Thirley Farmers Grain & Coal Co. v. Peoples, 146 Ill. App., 285.

One of the issues made by the pleadings in this case was whether the certificate in question had been assigned to the Secretary of the Corporation, as required by the by-laws of the corporation above referred to. It does not seem to have been questioned in the court below and it certainly is not questioned here that the by-law requiring such assignment to be to the Secretary of the corporation is a reasonable one, and one necessary to be complied with. The

proof settles beyond controversy that it was not so assigned. While we are not aware of any decided case where the reasonableness of the identical by-law under consideration has been passed upon, similar by-laws have been held to be reasonable and a compliance therewith necessary in the transfer of stocks of corporations. In Pane v. Young, 61 Pa., 180, a by-law requiring the transfer to be made by indorsement in writing in the presence of the cashier or two other witnesses was held to be valid and that a compliance therewith was necessary. In Planters Ins. Co. v. Selma Savings Bank, 63 Ala., 585, a by-law requiring the registry to be made in the presence of the president and secretary of the corporation was upheld. See also Cook on Corporations, 6th Ed., sec. 383.

Appellee having failed to show a compliance with the reasonable requirement of the by-laws of the corporation as to the manner in which transfers of stock must be made, he failed to establish a clear right to the remedy sought. The awarding of the writ under these circumstances was error.

The order of the Superior Court, is, therefore, reversed and the cause is remanded to that court with directions to deny the prayer of the petition of appellee.

REVERSED AND REMANDED
WITH DIRECTIONS.

418 - 1841.

LOUIS GREENBERG, Appellant,
vs.
FLORENCE PARSONS, Appellee.

APPEAL FROM C
CIRCUIT COURT,
COOK COUNTY.

184 I.A. 434

MR. PRESIDING JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellant began a suit in replevin in the Circuit Court. The property in question was duly taken under the writ and delivered to appellant. Appellee appeared in person and by counsel and filed her pleas. The common law record filed in this court shows that the cause was reached for trial; that the plaintiff failing to prosecute his suit the same was on motion of the defendant dismissed at the costs of the plaintiff, and that a writ of retorno habendo was ordered. There is also something that is labelled a "Bill of exceptions", included in this record. It recites that "the above entitled cause was reached for trial on the short cause calendar, the same having been placed on said calendar at the instance of the defendant and the cause having been reached for trial and the plaintiff failing to prosecute his suit, etc., on motion of the defendant the suit was dismissed."

No exception to the action of the court in dismissing the suit is preserved in, or motion to set that order aside is shown by this so-called bill of exceptions.

The only reason urged by appellant [illegible] of this judgment is "that the Circuit Court did not obtain jurisdiction over the subject matter and the appellant for the want of a notice being served upon Appellant". The notice referred to being a notice of the filing of an affidavit

under Section 27 of the Practice Act for the placing of the case on the short cause calendar.

The jurisdiction of the Circuit Court is general and unlimited. When a Circuit Court is shown to have jurisdiction of the subject matter in, and of the parties to, a suit, all presumptions are indulged in, in favor of the regularity of all subsequent proceedings up to and including its final judgment, and will prevail until the irregularity of the same is affirmatively shown. Christie v. Walker, 130 Ill. App., 434, and cases there cited. That the Circuit Court had jurisdiction of the parties to, and the subject matter in litigation in this case, is not questioned.

For the purposes of this case it may be conceded that the leaving of a copy of the notice with Dorothy Rabineau was not such notice as is contemplated by the statute, and further that this cause was disposed on the short cause calendar, still in the absence of an affirmative showing that that notice was all the notice given appellant, of the filing of the affidavit under section 27 of the Practice Act, it will be presumed that other proof of a proper service of such notice was presented to the court.

Again, the common law record does not affirmatively show that the case was disposed of on the short cause calendar, and the recitals in the so-called bill of exceptions can not be considered by this court, because the same is signed by a judge who did not try the case, and there is nothing in the record to show that the judge who tried the case was "by reason of death, sickness or other disability", unable to allow and sign the same, and these are the only conditions under which a bill of exceptions may be signed by any one, other than the judge who tried the case. See Section 81, Chapter 110, R. S.

The fact that the trial judge was "not sitting within the jurisdiction" at the time the so-called bill of exceptions was signed, is no disability rendering him unable "to allow and sign a bill of exceptions". Rosenbom v. Bank, 131 Ill. App., 336; Sup. Ct. of Foresters v. Knowles, 114 Ill. App., 641; Chicago v. So. Pk. Comrs., 188 Ill., 387.

The record presented does not disclose the error complained of and the judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

118 - 17642.

184 I.A. 436

HARRY A. BIOSSAT,
Defendant in Error,

vs.

M. B. LOUIS and T. W. BROPHY,
Defendants.

TRUMAN W. BROPHY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAUMAN DELIVERED THE OPINION OF THE COURT.

In a suit in the Municipal Court by defendant in error, Harry A. Biossat, against M. B. Louis and T. W. Brophy, wherein service of process was had on Brophy alone, a trial by the court without a jury resulted in a finding and judgment against Brophy for $500, to reverse which judgment he prosecutes this writ of error.

On May 19, 1910, plaintiff in error endorsed a note for $500, payable in ten days, for the accommodation of M. B. Louis, the maker, to whom the note was made payable. This note was taken up at maturity, when a second similar note was executed, and thereafter upon the maturity of said second note a third note for the same amount, maturing June 22, 1910, was executed and endorsed in like manner, and discounted at the South Side Savings Bank. Upon the maturity of the third note, Louis sought to take it up by discounting a like note dated June 22, 1910, payable ninety days after date, which, after its execution and endorsement by him, he sent to defendant in error with the request that he take the matter up with plaintiff in error and procure his endorsement.

Plaintiff in error refused to endorse the note, unless he was provided with funds with which to take up the over due note at the bank, and thereupon defendant in error, upon his own responsibility, procured a loan of $500 from one of

his clients, which he turned over to plaintiff in error, who accepted the same and endorsed the note of June 22, 1910, which was thereafter held by defendant in error. Plaintiff in error then also applied the money received by him from defendant in error to the payment of the overdue note at the bank. The claim in this suit is upon the note of June 22, 1910 which plaintiff in error thereafter refused to pay.

Plaintiff in error now says that the paper sued upon is not a promissory note; that according to the testimony of defendant in error he was simply procuring the endorsement of plaintiff in error for the accommodation of Louis, and that when such endorsement was so procured the note was to be returned to Louis; that defendant in error was an attorney and was so acting for Louis, and that the $500 paid by defendant in error was paid for Louis; that the endorsement of plaintiff in error was without force and effect, because the note was endorsed for an attorney or an agent for a principal and was held to maturity and sued upon by such attorney or agent; that the endorsement by plaintiff in error was an accommodation endorsement, and as such can not be enforced by an immediate party to the note; that presentation of the note to Louis, notice of protest and notice to plaintiff in error are void, because defendant in error had no authority to claim the note as his own.

Each of the several propositions of law submitted by plaintiff in error were held by the court as the law of the case, and plaintiff in error tried the case in the court below upon the theory that if the facts involved in said propositions of law submitted by him were found against his contention, defendant in error was entitled to a recovery upon the claim as made. It is manifest, therefore, that the facts involved in said propositions were found against the contention of plaintiff in error.

The substance of said propositions so submitted by plaintiff in error and held by the court is as follows:

1. That if defendant in error represented to plaintiff in error that he came to plaintiff in error as the representative of Louis and defendant in error disclosed the fact to plaintiff in error that he was an attorney, then all things said and done by defendant in error relative to the adjustment of the payment of the note in question was done by him as the attorney for Louis regardless of any understanding that might have been entered into between defendant in error and Louis, and which understanding remained undisclosed to plaintiff in error, unless the evidence shows a separate and distinct contract between defendant in error and plaintiff in error independent of said Louis.

2. That if defendant in error undertook to negotiate for a settlement or an extension of time of the note in question for and in behalf of Louis alone and in no other capacity and he was at the time an actual practicing attorney and disclosed that fact to plaintiff in error and said in effect that he represented Louis; then in legal effect he was the attorney for Louis in said transaction and can not be considered an independent party acting directly on his own behalf with plaintiff in error.

3. That in a matter of controversy between two parties, if a third party known to be an attorney presents himself as the attorney of one of the parties to said controversy, then said attorney is estopped from denying the relation of attorney and client between himself and the party that he holds to represent if he has led the other party to the controversy to do any act or thing by reason of said representation and that alone.

4. That in the note sued upon plaintiff in error is an

accommodation indorser, and defendant in error is an accommodation holder with notice and without value, unless at the time of the payment of five hundred dollars over to plaintiff in error said defendant in error disclosed to plaintiff in error that he was not paying said five hundred dollars over for the benefit of Louis, but that it was an independent loan made by defendant in error, or for some party for whom defendant in error was acting other than Louis.

5. That if defendant in error gave to plaintiff in error five hundred dollars, and it was known to plaintiff in error or to the attorney of plaintiff in error that the five hundred dollars came from a fund and was owned and loaned by some other party than defendant in error or Louis, nevertheless defendant in error would be an accommodation holder with notice and without consideration as to plaintiff in error unless defendant in error disclosed the fact to plaintiff in error that the money was not obtained for and in behalf of Louis, but was obtained independently from defendant in error or some person represented by him.

6. That if defendant in error was, as a matter of fact, the attorney for Louis in this transaction, and paid the five hundred dollars over to plaintiff in error as the attorney of Louis, to discharge a note upon which plaintiff in error was security for Louis, then this note sued upon is a note in the hands of defendant in error without consideration.

The evidence bearing upon the several positions of fact involved is so closely conflicting that the finding of the trial court in this case must be held to be conclusive.

Some of the grounds now urged by plaintiff in error are wholly at variance with the position assumed by him in the trial court. He cannot be permitted so shift his position in a court of review.

There is no error in the record affecting the merits of the controversy and the judgment is affirmed.

JUDGMENT AFFIRMED.

184 I.A. 437

Prather, which firm was a member of the Tacoma Real Estate Board, was employed to sell the premises for sale at public auction through the agency of said real estate board. To this end, appellee, on December 31, 1929, executed a "listing contract", whereby she agreed to sell the premises at auction and to convey to the successful bidder a good and merchantable title thereto. The contract contained a description of the premises, as hereinafter stated, but the same were further described under the designation "Improvements", as "street and number 7415-19-21-23 East 41st, and 7416-18-20-22 East 41st., each front 50 feet, and each front 50 feet of even lot 40 x 100". The contract further provides that the description is made of the owner's best knowledge and belief and only for the purpose of identifying the property and the successful bidder shall be deemed to have satisfied himself as to the correctness of the description before making his bid at the sale, that if any part of the successful bid shall be deposited with the real estate board to remain in escrow, on the joint order of the owner and bidder, to be held as earnest money, that a Torrens certificate of title, or complete merchantable abstract of title brought down to date of auction, or merchantable title guaranty policy shall be furnished by the owner to the successful bidder; that if abstract is furnished the successful bidder shall deliver to the vendor an opinion of title within 10 days thereafter, specifying objections to title, if any; that the vendor shall have 60 days thereafter to cure material defects in case any such are found and in case such defects are not then cured the bidder may declare the sale null and void; that time shall be of the essence of the contract. Pursuant to this contract the real estate board, by various means, advertised the premises for sale at public auction at the board rooms on November 11,

1909. One of the means adopted for advertising the sale was a printed circular containing descriptive matter, together with a plat of the block bounded on the north by 74th street, on the east by Lake Michigan and Lake Ave., on the south by 75th street, and on the west by Dana avenue, being the block in which the lots in question are situate. Upon this plat lots 138 and 139, which extend back to both across the full width of the block, are shown within the designated lot lines by lines drawn transversely from northeast to southwest, and the land lying east of the east line of lot 139 to the lake, including the portion of Lake Avenue, between said east line of lot 139 and the lake, is shown by lines drawn transversely from northeast to southwest. The circular was entitled "Lake Shore and Boulevard Frontage", and contained, among other statements, the following:

"This property consists of a frontage of 150 feet on Dana ave. Boulevard, running through to Lake Michigan 450 feet fronting one hundred feet on the proposed Lake Ave. Boulevard".

"It is admirably adapted for a gentleman's home with large grounds on the Lake Shore."

"There is only a small amount of Lake frontage on the south side accessible, and this is the only entire property running through from the boulevard to lake."

Mr. Raymond Robbins, who had viewed the premises several years previously, being advised by an inspection of a sign board, and of the circular referred to, that the premises were to be sold at auction, contemplated purchasing the same for the purpose of establishing a bathing beach, and to this end requested appellant, Mullenbach, to attend the sale and take title to the premises in his name. Printed pamphlets, prepared by the real estate board, containing rules governing the auction sale, instructions to bidders and descriptions of the properties to be offered for sale, were

accessible to the interested bidding respective bidders and persons present at the bidding rooms, including appellant and Mr. Tebbles. Public was thereby given that the descriptive literal contained had been compiled only from the listing contracts signed by the various sellers; that such descriptions were believed to be correct, but the board assumed no responsibility therefor; that the copies of each listing contract were there on file; and bidders were hereby requested to verify for themselves all statements and to familiarize themselves otherwise with the listing contracts of properties on which they expected to bid. The description of the premises in question, so far as here involved, was stated in said pamphlet as follows: "4425-45 Sand avenue. 4436-44 Lake avenue. This property consists of the plot of ground 100 x 187, having a frontage of 200 feet on Sand avenue and 100 feet on Lake avenue and running from one street to the other a depth of 433 feet".

At the time and place named in the notices of sale the premises, as described in the listing contract, were struck off and sold at public auction to appellant, and shortly thereafter upon the same day appellant signed a memorandum endorsed upon the back of said listing contract, as follows:

"The above described property, having been offered at Public Auction at the rooms of The Chicago Real Estate Board on the 11th day of November, 1909, and having been struck off to James Mullenbach the best bidder at said sale, at the price of $12,000 upon the terms in the listing contract above set forth, said James Mullenbach, the undersigned in consideration thereof has deposited the sum of $1,200 with The Chicago Real Estate Board to be held by them in escrow as provided in the listing contract above set forth as earnest money on said bid, and agrees to carry out all the provisions to be carried out by the successful bidder in the foregoing listing agreement signed by Louisa S. French on the 22nd day of October, 1909."

Shortly after the sale appellee submitted to ap-

pellant's attorney, Mr. Macartney, abstracts of title to the north and south halves of lot 155 and also an opinion of title to lot 156 issued by the guaranty department of the Chicago Title & Trust Co. Accompanying said abstracts of title and made a part thereof was a copy of a recorded document embodying the restoration of a plat of the subdivision in which the premises in question were located. This plat bears date June 22, 1871, and shows Lake avenue of the width of 150 feet to the east of lot 156, and also shows a narrow strip of ground lying between the east line of Lake avenue and the waters of Lake Michigan, designated as lot 180. Objections were made by Mr. Macartney to the title to both lots 155 and 156, but all such objections were removed, except such as were stated, as follows:

"These premises were sold under a special bulletin referring to the auction sale and containing a plat in which lot 156 is colored and shown to extend to the water of Lake Michigan, purchased only with a street easement (Lake Avenue).

"The plat of the Subdivision, No. 77 of the abstract, does not show such ownership, but on the contrary shows a similar plat with the lot line ending with the easterly line of the street.

"In addition to this it shows that there was lot 180 platted beyond the original limits of the street, from the owners of which it would be necessary to obtain quit claim deeds, as in any event had the lot division lines as represented by the plat the private claims to lot 180 would be a substantial cloud thereon."

In lieu of an abstract of title appellee then procured a title guaranty policy on said lots 155 and 156, except as to "rights or claims of parties in possession, not shown of record and questions of survey", and certain other exceptions not here involved, which policy, together with a sufficient warranty deed of the premises, appellant refused to accept. Notice was thereafter served by appellee upon appellant demanding a compliance by the latter with the terms of sale, and upon his refusal so to do a subsequent notice was served by appellee of her election to declare appellant in

defects. Undoubtedly appellant's brief contains a notice to appellee that the latter had failed to cure material defects in the title within the time allowed, and pending report to the contract under [illegible] pursuant to the [illegible] Contract Law of 1919, such parties were issued upon the [illegible] Failure shall be put in [illegible] respectively the amount [illegible] appellant on account of earnest money.

Appellant seeks a rescission of the contract of sale upon the several grounds set forth in his objections to the title to [illegible], above quoted, and also upon the further grounds, first, that upon the day preceding the sale appellee verbally represented to appellant to be, believe that the property in question had riparian rights, second, that the title guaranty policy tendered by appellee was not in compliance with the provisions of the contract in that it was made subject to questions of survey, and, third, that the records of the record disclose that 40 or 60 feet of the northerly portion of lot 155 was reserved by the owners of Lake Michigan, which then established a permanent state line, which state line was thereafter extended to its present eastern limits by means of a pier constructed in the bed of the lake at a point immediately north of and adjacent to the north line extended of lot 155, whereby the land so made became and is the property of the state.

Unquestionably, if appellant was induced to enter into the contract of sale in question by the misrepresentations or false representations of appellee or her agents relating to material matters, he is entitled to rescind the contract and recover back the earnest money paid by him thereunder.

The plat and the matter descriptive of the premises which appear in the circular or bulletin advertising the sale are to be construed together, and when so construed it is

Excluding or excepting, however, from consideration the public easement in Lake avenue, as it appears upon the plat shown in the circular, said plat, together with the descriptive language employed in the circular, constitutes an unmistakable representation by appellee that no privately owned land existed between the east line of lot 156, as there designated, and the waters of Lake Michigan.

unsupported. The finding of the commissioner, as stated in the briefs, is equivalent to a finding that the evidence fails to support the contention of appellant upon that issue.

There was offered in evidence the certified record of a plat of the South Shore Subdivision of the fractional section, showing the land including the premises here in question, was originally surveyed and subdivided into blocks, lots and streets, in June, 1871. This plat fails to conform to the statutes in several essential particulars and operated to constitute merely a common law dedication of the streets thereon indicated, and not a statutory dedication of such streets, so that the abutting owners own title to the center of the streets, subject to an easement therein in favor of the public. That this plat constituted merely a common law dedication appears to have been stipulated, or at least not controverted, by counsel for appellant at the hearing. The land embraced within the plat is thereby shown to be bounded on the north by 71st street, on the east by the waters of Lake Michigan, on the south, by a point 60 feet south of and parallel to 75th street, and on the west by Yates avenue. Lake avenue is thereby shown to be 100 feet in width, and abutting the east line of Lake avenue its entire length, as shown by the plat, appears a narrow strip of land designated as lot 180, the dimensions of which are omitted, extending from 71st street on the north to 75th street on the south, and bounded on the east by the waters of Lake Michigan.

The main controversy in the case, as we view it, relates to the actual status of lot 180 and to the rights, if any, of the former owners of said lot.

It is uncontroverted that for a period of at least 30 years the strip of land designated upon the plat as lot 180, between 73th and 75th streets, together with the greater portion of the strip of land designated as Lake Avenue, have

such submergence was gradual and imperceptible, and is permanent, the title to the land so submerged became lost to the owner, but if such submergence was sudden and perceptible in its operation, the title to the land so submerged remains in the owner, and the owner may regain the same either by natural or artificial means. City of Chicago v. Ward, 169 Ill., 392; Commissioners of Lincoln Park v. Fahrney, 350 Ill., 256.

Ineffectual efforts were made by appellant to procure title to the portion of lot 180 lying east of the premises in question and negotiations by appellant to that end were in progress when this controversy arose.

The terms of the so-called listing contract having been fully complied with by appellee, she is entitled to recover the earnest money deposited by appellant in escrow, unless appellant has shown that said contract was entered into by him upon the faith of the alleged false representations by appellee, and the burden of proving the falsity of of such

upon this appeal. [illegible], 141 Ill., 372. However this may be, it is [illegible] Douglas v. Marshall, 168 Ill., 436, where a somewhat similar contract covering the payment of earnest money was involved, that the rule that a court of equity will not enforce a penalty or forfeiture but will enforce a [illegible] upon the details of the matter, [illegible] applied upon the question, was [illegible]. [illegible] [illegible] a distinction [illegible] [illegible] [illegible]

214 - 18251.

184 I.A. 439

JOHN D. CASEY, as Administrator of the estate of FREDERICK F. RIECKHOFF, deceased,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY and CITY OF CHICAGO,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is a suit by John D. Casey, as administrator of the Estate of Frederick F. Rieckhoff, deceased, against the Chicago Railways Company and the City of Chicago, to recover damages for wrongfully causing the death of plaintiff's intestate. At the trial in the Superior Court peremptory instructions were given to the jury at the close of plaintiff's evidence, and upon the directed verdict finding defendants not guilty, judgment was entered against plaintiff in bar of his action and for costs.

The evidence for the plaintiff tends to show the following state of facts: At the time of his death the deceased was a teamster in the employ of a wholesale liquor establishment, for which he delivered goods to retail customers. On and for possibly a month prior to June 29, 1909, the defendant railway company, with authority from the defendant City of Chicago, was and had been engaged in reconstructing its street car tracks on west Twelfth street. During such period of reconstruction the old south or east bound track had been temporarily removed to the south side of the street immediately adjoining the curb, where it was placed upon the surface of the street, the rails and ties being entirely exposed, without any filling between the ties. At the time of the occurrence in question the two new tracks in the center of the

street had been fully completed and surfaced, but the railway company had not then used the new north or west bound track, and was using the temporary track for east bound cars and the new south or east bound track for west bound cars. On the afternoon of the day above stated, the deceased being accompanied by his son, aged 13 or 14 years, drove a team of horses hitched to a heavy wagon east on the south side of the street between the temporary track and the new south track, and stopped in front of a saloon, located about the middle of the block, for the purpose of delivering a keg of liquor. The deceased alighted from the wagon, directed his son to hold the lines, and was carrying or rolling the keg across or over the temporary track, when a passing west bound car "scratched" or "scraped" the whiffletree, and thereby caused the horses to become restive, - "kind of scared them"-. Upon noticing the actions of the team deceased directed his son to turn the horses around on the other or north side of the street. As the boy was driving the team around, as directed, they took fright at a cloud of dust and some pieces of paper blown by a gust of wind and started to run in a southwesterly direction toward the temporary track. The deceased then ran into the street, and grasped the lines near the horses bits, and thus sought to stop them. The horses crowded the deceased upon the temporary track, where he had about succeeded in stopping them, or had gotten them under control, when his foot caught in the open space between the ties and was there held fast, so that he fell down. The horses becoming frightened by the falling of the deceased again started to run, and the deceased having extricated himself held on to the lines, until he stumbled against the ties and rails and again fell down and was thereby compelled to release his hold on the lines. Before the deceased could again arise the wagon ran over him causing the injuries which resulted in his death.

In the several counts of the declaration plaintiff charged the railway company with negligence in constructing and maintaining the temporary track with unfilled ties and openings between said ties; charged the City with negligence in maintaining the street in an unsafe condition and in permitting the railway company to construct and maintain said temporary track; charged both defendants with negligence in maintaining said temporary track and in maintaining the street in a dangerous and unsafe condition; charged the railway company with negligence in failing to remove the temporary track within a reasonable time after the completion of the work of track reconstruction; charged the city with the like negligence; and charged both defendants with the like negligence.

If any rule of law can be held to be settled in this state, it is that, if there is any evidence in the record from which, standing alone, the jury could, without acting unreasonably in the eye of the law, find that all the material allegations of the declaration had been proven, then the case should be submitted to the jury; that in passing upon a motion for a peremptory instruction, it is not within the province of the trial court to weigh the evidence and the question of the preponderance of the evidence does not arise; that the question whether the verdict is against the manifest weight of the evidence is one to be passed upon by the trial court upon motion for new trial, and, in the event that such motion is overruled and judgment entered, for the Appellate Court upon error assigned. Libby, McNeill & Libby v. Cook, 222 Ill., 206.

Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or

established facts, the questions of negligence, contributory negligence and proximate cause are questions of fact for a jury.

The mere fact that the temporary track was constructed and laid in a manner usual throughout the city, does not absolve the defendant from negligence, either in permitting said track to be maintained in the street an unreasonable length of time, or in permitting said track to remain in the street and be used for the operation of cars after the new permanent tracks were completed and ready for use.

The unfilled temporary track was placed on the surface of the street at a point where persons delivering goods from wagons on the south side of the street were necessarily required to walk upon and over said track and to use the portion of the street adjacent to said track as a drive-way and in the management and control of their horses. In order to charge a person with the consequences of his negligent act, it is not necessary that he must have foreseen the precise form in which the injury occurred. If, when the injury occurs, it appears that it was a natural and probable consequence of his negligence, it is sufficient to warrant a recovery. Again, as to proximate cause, while the negligent act or omission must be one of the essential causes producing the injury, it need not be the sole cause nor the last or nearest cause. If it concurs with the other cause, such as an accident or the negligent act of a third person, which in combination with it causes the injury, it is sufficient. Waschow v. Kelly Coal Co., 245 Ill., 516.

The fact that the injury complained of was occasioned to the deceased while he was attempting to control a fractious or frightened team of horses, which were properly on the street at a point adjacent to or near the temporary track, and who, in so doing, was necessarily required to go upon

said track, does not demand a holding that, as a matter of law, the defendants cannot be held liable for an injury to the deceased occasioned by the unfilled ties of said track, upon the ground that such injury was not the natural and probable consequence of the acts of the defendants in so constructing and maintaining said track and in permitting the same to be so constructed and maintained. The question was one of fact for the jury.

Appellees insist that the deceased was guilty of contributory negligence, as a matter of law, in directing his son, a lad of 14 years weighing 80 pounds, to drive a heavy team of horses around in the street. If like questions were to be determined by trial courts or courts of review, as questions of law, trial by jury would be practically abolished and destroyed. Whether or not the deceased was guilty of contributory negligence, in the respect mentioned was undoubtedly a question of fact for the jury.

For the error in giving the peremptory instructions the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

328 - 18368.

184 I.A. 441

JOHN POZDAL,
Appellee,

vs.

C. C. HEISEN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an action on the case instituted in the Superior Court by appellee against the appellant, C. C. Heisen, and the Federal Steel Fixture Company, to recover damages for personal injuries. The suit was dismissed as to the Federal Steel Fixture Company and proceeded to trial by jury against the appellant, which trial resulted in a verdict and judgment against appellant for $3,500.

The declaration contains three counts and an additional count. The first count, omitting the charges of negligence by the defendant, Federal Steel Fixture Company, charges, in substance, that appellant was the owner and had control of a certain building and of a certain elevator used for the carriage of freight and passengers to and from the several floors of said building by the tenants of appellant in common; that the defendant, Federal Steel Fixture Company, was one of the tenants of appellant in said building, and had the right in common with other tenants to use said elevator for the purpose of transporting merchandise and servants to and from the different floors; that appellee was in the employ of said defendant fixture company, as a common servant for hire and was under the control and direction of a general foreman of said defendant; that while so employed, it became necessary for appellee in the performance of his duties to use

said elevator or elevator shaft in the business of said defendant; that it became and was the duty of appellant to furnish and maintain a reasonably safe door or doors in said elevator shaft with appliances attached thereto on the second floor of said building, so that the same could be safely closed or opened without risk or injury to a person who had occasion to rightfully use it; that appellant not regarding its duty in that behalf, negligently furnished and maintained certain automatic sliding iron doors, with appliances thereto, on said second floor in said elevator shaft in an unsafe, defective and dangerous condition, so that by reason thereof any person who might, in the due course of business, attempt to open or close said door or doors while said elevator was being run and operated, was liable to be caught and injured; that appellee, while in the exercise of due care in pursuance to the direction of a foreman of the defendant fixture company, was attempting to open said sliding iron doors, for the purpose of receiving orders and directions through said elevator shaft from the floor below, in and about the business of said defendant fixture company, the same for want of repair and safe condition stuck and became immovable, and while appellee was attempting to open the same without fault on his part and without notice or warning that said elevator was then and there being operated, was struck upon the head and permanently injured.

The second count charges a duty on the part of appellant to employ a competent, experienced and careful servant to operate said elevator for the safety of tenants and their servants who had occasion to rightfully use it, and a breach of said duty, whereby appellee was injured. The third count charges that appellant kept and maintained the automatic sliding doors with the appurtenances thereto of said elevator shaft in an unsafe condition, contrary to the

statute.

The additional count charges a failure on the part of appellant to comply with the provisions of an ordinance of the City of Chicago relative to the maintenance of automatic doors on freight elevators.

The evidence tends to establish the following facts: Appellant was the owner of a five story building, the first floor and a portion of the second floor of which was leased by him to the Federal Steel Fixture Company, hereinafter called the fixture company. The first floor was used by the fixture company for cutting and preparing material for steel lockers and the second floor was used by it as an assembling room where the various parts of the lockers were assembled and where the lockers were prepared for shipment. In the west end of the building appellant maintained and operated a freight and passenger elevator for the use in common of the tenants in the building. The elevator shaft was enclosed upon three sides with brick walls, the one side which affordes access to the several floors being protected by corrugated iron doors, which were constructed to open and close automatically at a point midway between the ceiling and the floor by being raised or lowered. This elevator was the only means of access available to the employes of the fixture company between the first and second floor, the stairway between said floors, where it opened upon the second floor, being in a portion of said floor occupied by another tenant. When the doors of the elevator were fully opened, the opening was 7 feet high and 5 feet wide. Each of the doors were, therefore, approximately 3½ feet high and 5 feet wide. The elevator was operated by steam power and was made to ascend by pulling a cable on the right side and to descend by pulling a cable on the left side, said cables being located within the elevator. There was no signal button or other device located at the elevator shaft upon the second floor, whereby the operator in

charge of the elevator might be notified that the elevator was required to be stopped for service at that floor, and the only means commonly adopted for that purpose was by calling to the operator or by rapping or kicking on the corrugated iron doors. No handle or other means was provided for opening or closing the door from the outside of the elevator. Sometime prior to the accident in question the lower of the two elevator doors had been out of repair. The door and also the grooves in which it operated at the sides were warped and bent, and the chains within the elevator, and whereby the doors were intended to be raised or lowered, had broken apart and were repaired by being fastened together with wires. Owing to the condition of the lower door and its connections, as described, an attempt to open the doors, when fully closed, either from within or without the elevator, was attended with considerable difficulty, and, therefore, the operator of the elevator usually only partially closed the doors, leaving an open space of 6 or 8 inches between them, so that when occasion required, they might be more readily opened by affording the operator an opportunity to grasp hold of or stand upon the top of the lower door and push it down. Even when the doors were thus partially open, the lower door when attempted to be pushed down would bind at either end and upon the application of greater pressure would go down suddenly and without resistance several inches, and then suddenly bind again and stick fast until still greater pressure was applied upon it. When, in the ordinary course of business, it became necessary for an employe of the fixture company on one floor to communicate with an employe on the other floor, the method commonly adopted was for the employe on one floor to go to the elevator shaft, and by calling, or by rapping upon the iron doors, attract the attention of an employe on the other floor who, in response to the signal, would go to the elevator

shaft, and there receive the message or carry on the conversation. Whether the elevator doors on the first floor were ordinarily kept open or closed does not clearly appear, but as the doors on the second floor were ordinarily kept open 6 or 8 inches and as the elevator shaft was commonly used as a convenient and efficient means of communication in the manner stated, it is fairly inferable from the evidence that the doors on the first floor were ordinarily kept open a sufficient distance to afford an opportunity for such method of communication. On October 2, 1909, appellee was employed by the fixture company in erecting lockers on the second floor. At about 4:45 o'clock in the afternoon as appellee was about to have his daily time check approved by the foreman of the fixture company on the second floor, a call from the first floor was heard at the elevator shaft on the second floor. The foreman told appellee to go and see what was wanted and in response to such direction appellee went to the elevator shaft where he found the doors open the usual distance of 6 or 8 inches. For the purpose either of enabling him to better hear the communication, or of placing himself in a position where he could look into and down the elevator and see the person on the first floor, appellee grasped the top of the lower door with his hands and attempted to push it down. In response to his effort the door slid down a few inches to a point where it became bound, thereupon he applied greater force and the door then slid down a few inches further so suddenly and rapidly that his body was thrown forward and down upon the door, and his head was projected into the elevator shaft. At that instant the elevator, which was descending in the shaft, struck appellee on the back of the head and caused the injuries complained of. Prior to the occasion in question appellee had never attempted to open or close the elevator doors, or gone to the elevator shaft

for the purpose of responding to a call by anyone from the first floor, or of calling to anyone upon that floor.

Appellee had given no signal to the operator of the elevator to stop the elevator at the second floor and there was no custom requiring the operator to stop the elevator at the second floor without a signal. The operator had no knowledge or means of knowledge that at the time in question appellee was in a place of danger and no duty was imposed upon the operator to ascertain whether or not some person might be in the elevator shaft beneath the descending elevator. The elevator was descending noiselessly and appellee had no knowledge that it was in fact descending.

In the view we are constrained to take of the case, it will only be necessary to consider and determine one of the numerous questions raised by appellant upon the record.

It is settled law that a landlord who rents different parts of his building to various tenants, reserving the elevators, halls, stairways and other approaches for the common use of his tenants, is under an implied duty to use reasonable care to keep such instrumentalities and places in a reasonably safe condition, and is liable for injuries to persons lawfully using such instrumentalities and places, resulting from a failure to perform that duty. Shonlinger Co. v. Mann, 219 Ill., 348; Mueller v. Shelm, [illegible] Ill., [illegible].

In the case at bar appellant was under an implied duty to exercise reasonable care to keep and maintain the elevator in his building in a reasonably safe condition, and to exercise reasonable care to operate the elevator in a reasonably safe manner.

If at the time he was injured appellee was rightfully engaged in and about the elevator or the elevator shaft in the performance of a service, or in a capacity with respect

to which appellant owed to him the duty to exercise reasonable care to keep and maintain the elevator doors in a reasonably safe condition, we should not hesitate to hold, under the evidence, that appellant had failed to discharge such duty, but we cannot so hold upon this record.

The principle that where there is no legal duty to exercise care there can be no actionable negligence, was fully recognized by appellee in his declaration, wherein it is alleged that it was the duty of appellant to furnish and maintain a reasonably safe door in the elevator shaft with appliances attached thereto on the second floor of said building, so that the same could be safely closed or opened without risk or injury to any person who had occasion to rightfully use it.

In McAndrews v. C. L. P. & F. Ry. Co., 323 Ill., 233, it is said:

"A person may be guilty of a negligent or reckless act and still not be liable for actionable negligence. Liability only follows a negligent or reckless act when the party guilty of the act owes to the party injured some duty which is violated by the commission of the negligent or reckless act. Thompson on Negligence (vol. 1, sec. 3,) says: 'Where there is no legal duty to exercise care there can be no actionable negligence. Therefore, it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him.' And in Bishop on Non-Contract Law (par. 446) it is said: 'To sustain an action for negligence the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed, either directly to the plaintiff or to the public, in a matter whereof he had the right to avail himself,*****there is nothing which the law will redress.'"

In Chicago U. T. Co. v. Giese, 229 Ill., 260, the rule is stated thus:

"The first requisite in establishing negligence is to show the existence of some duty and its violation. Negligence consists in the violation of a duty owing by the party

inflicting the injury to the person injured. Back of every instance of negligence must be found a duty to the individual complaining, an observance of which would have avoided the injury. To state the principle in other language, in every case involving actionable negligence there must exist three essential elements: First, the existence of a duty on the part of the person charged, to protect the complaining party from the injury received; second, a failure to perform that duty; and third, an injury resulting from such failure. When these elements concur they unitedly constitute actionable negligence, and the absence of any of these elements renders the pleading bad or the evidence insufficient, as the case may be. (2 Cooley on Torts, - 3d ed. - p. 1411, and cases cited.)"

There is not a scintilla of evidence tending to show that in attempting to open the elevator doors at the second floor for the purpose of communicating by means of the elevator shaft with a person upon the first floor, appellee was acting in the proper discharge of any duty, with respect to which appellant owed him a reciprocal duty to exercise reasonable care to keep and maintain said elevator doors in a reasonably safe condition. It is uncontroverted that the mechanism whereby the elevator doors were opened and closed was located within the elevator shaft, and was under the control of the elevator operator, who, alone, was charged with the duty of opening and closing said doors. In attempting to open the doors of the elevator appellee was acting wholly without the scope of his employment, and as an intermeddler, to whom appellant owed no duty save that of not willfully injuring him.

If the duty had devolved upon appellee to open the doors, and while attempting to do so for the purpose of signalling the operator to stop the elevator, or for the purpose of boarding the elevator, or for any other legitimate purpose, and he had been injured by reason of the unsafe and defective condition of the doors, a wholly different question would be presented.

The judgment is reversed with a finding of fact to be incorporated in the judgment of this court.

REVERSED WITH FINDING
OF FACT.

FINDING OF FACT:

We find that the injury to appellee complained of in this case was not occasioned by the failure of appellant to perform any duty which he owed to appellee.

370 - 19414.

184 I.A. 443

JOHN M. CARLSON, Appellant,	}	APPEAL FROM
vs.	}	SUPERIOR COURT,
WALTER J. HASSIS et al., Appellees.	}	COOK COUNTY.

MR. JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court dismissing appellant's bill for want of equity.

The bill alleges that prior to November 11, 1910, appellant, John M. Carlson, was the owner of twenty-eight shares in the North Side Sash and Door Company, a corporation, having an authorized and paid up capital of $6,000; that about March 1, 1910, the other thirty-two shares of stock of said company were purchased by appellees, Walter J. Hassis and Julius F. Levine, sixteen shares by each; that at the annual stockholders' meeting, held March 1, 1910, appellant and appellees were elected directors, and at a directors' meeting following, Hassis was elected president, Carlson vice-president and Levine secretary and treasurer; that it was understood by appellees that appellant was not to take any active part in the conduct of the business, but that appellees, in consideration of their salaries, should devote their entire time to the business; that appellant has taken no active part in the business, but the same has since been actively carried on by appellees; that practically the entire business of the company is done between March 1st and November 15th in each year; that from March to November, 1910, but one directors' meeting was held, at which meeting no report of the condition of the business was made. The bill further alleges that for several years prior to the purchase of stock

by appellees the profits of the business had been small and no dividends had been paid; that upon a reorganization of the company the stockholders had paid in $4,000 over the par value of the stock, including certain merchandise valued at $3,000; that the books of account of the company were continuously in charge of Hassis who remained in the office and managed all the financial affairs of the company; that Levine devoted all his time to selling goods away from the office; that on or about November 1, 1910, Hassis desiring to purchase appellant's stock offered to pay him $4,500 therefor; that appellant asked him what the profits of the business had been for 1910, and told him that the price of the stock would depend upon what the profits had been; that Hassis replied the profits had been from $1,800 to $2,000; that appellant then told Hassis that the money previously invested by appellant, together with his proportionate share of the profits for 1910, amounted to more than $4,500, and he thereupon declined the offer; that a few days thereafter Hassis offered to pay $5,000 for appellant's stock, of which $3,000 was to be in cash and $2,000 in notes, which Hassis then exhibited to appellant; that appellant did not then accept said offer, but asked for time to look up the credit of the persons who endorsed said notes; that on November 11, 1910, when both appellees came to see appellant about the purchase of his stock, appellant stated to Hassis that he relied on him for a correct statement of the profits for 1910, and again asked Hassis what said profits had been, to which inquiry Hassis replied that the profits were from $1,800 to $2,000; that Levine heard said representations, but said nothing; that relying upon said representations appellant sold and delivered his said shares to appellees for $5,000; that one share of said stock was retained on the books of the company in the

name of appellant, who at the request of Levine consented to remain as a director; that on January 16, 1911, appellant received a notice of a directors' meeting to be held on the day following, which notice stated the purpose of the meeting to be to declare a dividend; that on appellant's inquiry Levine told him the profits for 1910 were over $12,000, and that it was proposed to declare a dividend of $8,000; that immediately thereafter appellant notified appellees in writing that the alleged sale of his stock to them was procured by fraud and was void and tendered each of them $2,500 with interest and demanded the return of said stock, which tender and demand was refused; that the profits for 1910 of over $12,000, were substantially all earned prior to November 1st of that year; that the said representations were false and fraudulent, were so known to be by appellees and were made with the intention of inducing appellant to act thereon;

The bill prays that the purchase of said shares of stock be set aside; that appellees be required to return said shares to appellant and to account to appellant for the dividends received thereon.

In their several answers to the bill appellees deny that practically all the business of the company was done between March 1st and November 15th of each year; deny that any agreement was made to take an inventory in September and allege that the inventory was taken at the usual time; deny that appellant stated to Hassis that the price at which appellant would sell his stock would depend upon the profits for 1910, or that Hassis stated to appellant that the profits had been from $1,800 to $2,000, or that appellant stated that he relied upon Hassis for a correct statement of the profits, or that appellant was induced to sell his stock by any information as to profits, or that profits amounting to $12,000 were

substantially earned prior to November 1, 1910; deny that Hassis made any representations whatever as to profits, or that he knew at the time of the negotiations what the profits were; deny that Levine heard Hassis make any representations as to profits; allege that appellant had same opportunity as appellees of ascertaining what the profits were, and that appellant was fully cognizant of the condition of the business and that as vice-president and director, appellant had access to the books of account of the company.

Upon general replications being filed to said answers the cause was heard by the chancellor.

The evidence bearing upon the main issue of fact in the case, namely, whether or not the alleged false representations relative to the profits of the business for the year 1910 were made by Hassis and were concurred in and adopted by Levine, is irreconcilably conflicting.

The evidence discloses that subsequent to March 1, 1910, the active management of the business was entrusted to appellees who acquired their stock in the company several years after appellant became a stockholder; that during the time appellees were actively conducting the business, there were frequent dissensions between them, arising out of the charge by each that the other was not sufficiently active in procuring business; that several directors' meetings were held to consider such charges and counter charges, at which meetings appellant, contrary to the statement in his bill, was present, and sought to bring about a reconciliation between appellees; that as the relation between appellees continued somewhat strained, Hassis concluded to attempt to procure a controlling interest in the company by purchasing the stock owned by appellant; that after some preceding negotiations between all the parties, wherein, at the request

of Levine, it was agreed that he should be given an opportunity to purchase one-half of appellant's holdings, appellant on November 11, 1910, sold and transferred fourteen shares each to Hassis and Levine for $5,000; that appellant was thereafter retained as a nominal director of the company; that after an inventory was taken on December 31, 1910, the books of the company disclosed that the profits of the business for 1910 amounted to $11,684.84; that appellant was notified of a directors' meeting to be held on January 17, 1911, for the purpose of declaring a dividend; that on the same day appellant notified appellees of his purpose to set aside the sale of his stock and tendered to appellees the purchase price therefor with interest.

Appellant testified that when Hassis first approached him on November 3, 1910, for the purpose of negotiating for the purchase of his stock, Hassis inquired if appellant would sell for $4,500, $2,500 to be paid in cash and $2,000 in notes; that he asked Hassis how much money had been made since March 1st, 1910, and that Hassis replied, $1,800 to $2,000; that he then told Hassis he would not sell for $4,500, but did not tell Hassis that he would sell for $5,000; that two or three days following Hassis offered him $5,000, and came prepared to pay $3,000 in cash and $2,000 in notes; that he told Hassis he would accept the offer relying on the truth of the statement that the profits of the business were from $1,800 to $2,000; that Levine was present and heard Hassis make said statement.

Charles W. Carlson, a nephew of appellant, testified that he was present during a portion of an interview between appellant and appellees; that in response to appellant's statement that he was surprised they had made no more money than $1,800 or $2,000, Hassis said, "Yes, competition is keen. We have to figure very close. I am keeping tab and it is

figured down fine." He further testified that appellant said he would sell the stock on the basis of Hassis' statement as to profits.

Wm. Schaller, a witness called by appellant, testified that Hassis applied to him to endorse a note for $1,000, and that in response to his inquiry what he wanted it for, Hassis said he did not like to tell, but he had a chance to make $3,000 or $4,000.

Appellees testified that when they purchased their stock in March, 1910, appellant told them that whenever they desired to purchase his stock they could have it for $4,200, plus 6% interest, and that his subsequent selling price of $5,000, was arrived at upon that basis; that at the time the negotiations for the purchase of appellee's stock were pending, no inventory of the property of the company had been taken and they had no definite information as to the profits of the business for the year, 1910; that a considerable volume of business was done between the date of the sale, November 11, 1910, and the taking of the inventory, as of December 31, 1910; that they made no statement to appellant regarding the amount of the profits of the business, as testified to by him; that appellant was informed by them from time to time during the year, as to the volume of business that was being done by the company.

The evidence tends to show that it was practically impossible to determine the profits of the business until an inventory was taken, and that appellees so informed appellant.

There are several discrepancies, inconsistencies and contradictions in the testimony of some of the witnesses called by appellant, which tend to discredit their testimony. While the reasonable limits of an opinion of this court preclude a detailed analysis of the testimony of the several witnesses, we are fully persuaded, after a careful considera-

tion of the evidence, that the finding of the chancellor, who saw the witnesses and heard them testify, is not against the manifest weight of the evidence. In this state of the record we are required to confirm such finding. Ogden v. Stevens, 241 Ill., 556.

Appellees sustained no such fiduciary relation to appellant as cast upon them the burden of establishing the propriety and fairness of the transaction. Hooker v. Midland Steel Co., 215 Ill., 444; Rawlin v. Taylor, 254 Ill., 434.

For the purpose of discrediting the testimony of appellee, Levine, appellant offered in evidence Levine's petition for his discharge in bankruptcy, the report of the referee refusing such discharge, and a transcript of his testimony on the hearing of objections to such discharge. These proceedings in bankruptcy were had long prior to the transaction in controversy and had no relation to any proper subject of inquiry in the case. The proferred evidence was properly excluded.

There is no reversible error in the record and the decree is affirmed.

Decree affirmed.

399 - 18445.

184 I.A. 444

AMERICAN MUSICIANS UNION OF NORTH AMERICA,
Appellant,

vs.

CHICAGO FEDERATION OF MUSICIANS LOCAL No. 10, A. F. of M. et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BAUM DELIVERED THE OPINION OF THE COURT.

On July 18, 1908, upon an appropriate bill filed in the Circuit Court by the American Musicians Union of North America (hereinafter called the Union), and certain of its officers and members, against the Chicago Federation of Musicians, Local No. 10, American Federation of Musicians, (hereinafter called the Federation) and Joseph F. Winkler, and certain other officers and members of said Federation, the chancellor, after a hearing upon the issues formed, entered a decree restraining said defendants from interfering with hindering or obstructing the members of complainant organization or either of any of them by threatening or suggesting the opposition of organized labor unions or their members in such a manner as tends or as is calculated to cause any such employers or would-be employers to fear or believe that trouble would be caused such employers or would-be employers by said defendant corporation, its officers or members, or by other unions affiliated with the Federation of Labor or their members; and from interfering with, hindering or obstructing the members of complainant organization or any or either of them in obtaining or retaining employment as musicians by representing and proclaiming to employers or prospective employers that members of complainant organization are non-union men, in such a manner as is calculated

or will cause such employers or prospective employers to fear the opposition of defendants or any or either of them, or organized labor or any of its branches, or individuals or representatives of voluntary or incorporated associations. On October 13, 1906, said Federation, together with said Winkler and one B. C. Dillon, were, upon the petition of the Union, and after a hearing, adjudged guilty of contempt for a violation of said injunction and were punished accordingly. Again, on August 9, 1910, upon a like petition and hearing said Federation and said Winkler, were adjudged guilty of and punished for a like contempt.

On October 4, 1911, the said Union filed its verified petition, wherein it charged, in substance, so far as is here pertinent, that since the entry of the decree hereinabove referred to, the said Federation and Joseph F. Winkler, their associates and co-conspirators have been hindering, obstructing and interfering with the petitioner and its associates in the performance of their duties, as musicians; that the said Winkler, president of said Federation, has with other persons attempted to compel and induce by threats and intimidation and persuasion the employers of petitioner and its associates to refuse and fail to retain petitioner and its associates or any or either of them in their employ as musicians and that said Winkler has been and is now preventing and attempting to prevent persons by threats and intimidation from employing petitioner or any of its associates who are members of petitioner's organization, and that said Federation and said Winkler and their associates and confederates are now combining and conspiring to restrain and prevent persons employing petitioner or its fellow associates from so doing, and that said Federation and said Winkler and their associates and co-conspirators are conducting themselves in such a

manner as to intimidate and frighten the employers of your petitioner and its associates; that on August 19, 1911, the Cort Theatre Company, a corporation of which John Cort is president, H. H. Frazee is vice-president and U. J. Herrmann is secretary and manager, controlling the Cort Theatre in the City of Chicago, opened said theatre to the public for the season and presented a play entitled "An Every Day Man," which said play was given under the direction and management of the firm of Frazee & Lederer, a partnership composed of H. H. Frazee and George W. Lederer; that said H. H. Frazee is the vice-president of said Cort Theatre Company and also a member of said firm of Frazee & Lederer; that prior to the opening of said Cort Theatre on August 19, 1911, negotiations for the placing of an orchestra in said Cort Theatre had been carried on between said Herrman, as manager of said Cort Theatre Company and said Winkler and said Federation, but that owing to certain unreasonable demands regarding the number of men to compose the orchestra at said theatre made by said Winkler and said federation, said theatre company had refused to comply with said demands of said Winkler and said federation and had therefore refused to install in said Cort Theatre an orchestra composed of federation members; that on August 21, 1911, the said Herrmann on behalf of said Cort Theatre Company, entered into a contract with Charles Quinn, who is a member of the Union, the petitioner herein, wherein said Quinn agreed to furnish at a certain stipulated price an orchestra composed of himself as leader and six other musicians, all of which said musicians together with the said Quinn were and are members in good standing of petitioner's organization, to furnish music for the plays and performances to be presented at said Cort Theatre; that the said Quinn and his said orchestra commenced playing at said Cort Theatre on August 21, 1911, and provided music for said play.

The petition further charges that the business of said firm of Frazee & Lederer is to provide companies presenting musical and other plays throughout the country, and at present there are five companies presenting plays entitled "Madam Sherry" and one company presenting a play entitled "Jumping Jupiter" in different cities throughout the country; that there is also in the City of Chicago a theatre known as the Illinois Theatre, which has been closed during the summer and was about to open for business on September 16, 1911, presenting a play entitled, "The Ladies Lion", which was a musical show produced under the management of the said firm of Frazee & Lederer; that said Illinois Theatre management had entered into a contract with said Federation to furnish an orchestra at said Illinois Theatre for the season commencing on the opening night of September 16th, 1911; that within a few days prior thereto, the said Winkler wrongfully, maliciously and unlawfully, without justifiable cause and against the injunction of said court attempted to interfere with and obstruct the said members of petitioner's organization in their employment at said theatre by stating that unless Frazee installed a federation orchestra at the Cort Theatre, the federation orchestra under contract at the Illinois Theatre would not play for the opening of the Illinois Theatre on September 16, 1911, and further that unless said federation orchestra was installed at said Cort Theatre that the orchestras playing in all cities where the "Madam Sherry" and "Jumping Jupiter" shows then being staged under the direction of said Frazee & Lederer, were being presented, would be called out and not permitted to play; that afterwards on September 15, 1911, the said Frazee, one of the employers of said Charles Quinn and his orchestra, members of petitioner's organization, after learning of the above described threats made by said Winkler to the said representative of said

Frazee & Lederer and fearing trouble would be caused him and the firm of Frazee & Lederer and great loss of money ensue if said threats of said Winkler were carried out, which would interfere with the production of said show at said Illinois Theatre in Chicago and all other of Frazee & Lederer shows then playing in various cities throughout the country, went with said Herrman and said Lederer and others to the headquarters of said Winkler and said federation and there met the said Winkler and several members of said federation, who were also officers and directors of said federation; that at said time and place said Winkler in the presence of said other members, officers and directors of said federation, under their authority and with their approval, after the granting of the restraining order hereinbefore referred to and with full knowledge of the effect, tenor and scope thereof wrongfully, maliciously, unlawfully and without justifiable cause and against the injunction of the court attempted to interfere with and obstruct the said members of petitioner's organization in their employment at said Cort Theatre, by stating to said Frazee, and to the others present at said time and place, that the fight of said Winkler and said federation was against said Frazee and that unless the said Frazee would put a federation orchestra in the Cort Theatre, said Winkler and said federation would not furnish an orchestra composed of federation members for any Frazee & Lederer shows and that the show about to be presented on the opening night at said Illinois Theatre came under the ban, and also that said Winkler and said federation would call out all the orchestras throughout the country in the theatres where Frazee & Lederer shows entitled "Madam Sherry" and "Jumping Jupiter" were booked; that in order to avoid trouble with the orchestras playing for the other companies in other cities presenting the Frazee & Lederer

shows, if said Winkler and said federation carried out their threats, the said Cort Theatre company notified said Quinn that his contract at said Cort Theatre would terminate on October 1, 1911; that said Quinn and his orchestra have been forced out of said Cort Theatre and an orchestra composed of members of said federation installed at said Cort Theatre; that the services of said Quinn and his orchestra then playing under contract at said Cort Theatre were thoroughly satisfactory to the said Herrmann and the said Frazee and the Cort Theatre Company.

The petitioner represents that the said Federation and said Winkler, should be again and severely punished for contempt of court for a repetition of said violation as set forth in the petition; wherefore, the petitioner prays that a rule may be entered herein directing that said Federation and Winkler and each of them to show cause, if any they have, why they and each of them should not be attached and punished, as for a contempt of this court in aiding, abetting and assisting in violating said injunction heretofore awarded by the court.

In response to the rule to show cause, as prayed, the respondents answered the petition, denying its material allegations, and upon a hearing before the same chancellor who directed the issuance of the injunction, an order was entered discharging said rule and dismissing the petition. The Union prosecutes this appeal to reverse such order.

The findings of the chancellor, as embodied in the order appealed from, are substantially as follows:

That during the time in question, the respondent Federation had in force a rule providing that the orchestras of all first-class theatres in the down town district of the City of Chicago should be composed of not less than eleven men, and that the members of the Federation were not permitted to play in any first-class theatre, in the down town district in said city not using an orchestra of eleven or more men; that among the theatres to which said rule applied was the Cort Theatre; that the Cort Theatre Company is and was a corporation of which H. A. Frazee was vice-president and a minority stockholder, and U. J. Herrman was secretary and manager, and said company controlled and operated the said Cort Theatre; that during the summer of 1911 and prior to the opening of the theatrical season the Federation proceeded to put in force the said rule with reference to the minimum number of men that should compose an orchestra in first-class theatres in the down town district in said city, and notified all such theatres, including the Cort Theatre, to that effect; that at that time the Cort Theatre Company had not yet employed an orchestra for the ensuing season; that the Federation, through a committee and its president Joseph F. Winkler, also applied to and requested the company to employ members of the Federation to furnish the orchestral music at said theatre; that the Cort Theatre refused to employ an orchestra of eleven men, but expressed its willingness to employ an orchestra consisting of members of the Federation if the Federation would consent to withdraw from its position of demanding that such orchestra should be composed of not less than eleven men; that the Federation refused to recede from its demands regarding the minimum number of men that should compose an orchestra in the Cort Theatre and other first-class theatres in said down town district, and then followed the troubles and controversies referred to in the petition filed October 4, 1911, and

shown by the evidence offered and introduced in open court on the hearing of said petition; that the acts done by the Federation and said Winkler as shown by the evidence, were done for the sole purpose of obtaining employment for members of the Federation and enforcing the said rule relating to the minimum number of men that should comprise an orchestra in first-class theatres in said down town district; that the controversy between the respondents and the Illinois Theatre and Frazee & Lederer, as shown by the evidence, grew out of and had relation only to the said demand made by the Federation regarding the minimum number of men that should comprise an orchestra in the Cort Theatre and other first-class theatres in said down town district; that neither the petitioner Union, nor the orchestra led by Charles Quinn, referred to in the evidence, nor any of its members were involved in the said controversies between the Cort Theatre, Frazee & Lederer, and the Illinois Theatre on the one side, and the respondents on the other, nor was the employment or discharge of the said Quinn's orchestra, or of members of the petitioner organization, or any of them, by the Cort Theatre or Frazee & Lederer or the Illinois Theatre, to any extent the cause or subject-matter of said controversies; that neither the respondents or either of them, nor any person or persons on their behalf, sought or requested the discharge of the said Quinn's orchestra, or of any members of the petitioner Union, by doing any of the acts or making any of the representations or proclamations forbidden by the said injunctional decree entered herein; that the controversy between the respondents and the Cort Theatre arising out of the demand for a minimum of eleven men had already begun, and was in progress, at the time that the said Quinn's orchestra, composed of members of the petitioner Union, took employment at the Cort Theatre, as shown by the evidence; that the acts done and statements made by or on

behalf of the respondents, or either of them, after said Quinn's orchestra had been employed as aforesaid, were done and made not against the said Quinn's orchestra, or any members thereof, or any other members of the petitioner Union, or for the purpose of depriving them or any of them of their employment, in violation of said injunctional decree, but were had and made against the said Cort Theatre and the said Frazee for the purpose of enforcing the demand of the Federation regarding the minimum number of men that should comprise an orchestra, and for the purpose of obtaining employment for members of the Federation; that neither the personnel of the said Quinn's orchestra, nor the fact of the affiliation of the members thereof with the petitioner organization, nor the fact that they were not members of the Federation, entered into or became a part of the said controversy, or had any bearing on the actions of the parties to said controversy, or on the result arrived at by the contending parties; that the acts done and statements or representations made by or on behalf of the respondents, or either of them, as shown by the evidence, were not forbidden by the injunctional decree heretofore entered and did not constitute a violation of the said injunctional decree; that the said injunctional decree was not intended to, and does not, forbid or restrain the respondents or any of them, from using any and all lawful means to obtain employment for members of the Federation in competition with members of the petitioner organization, or forbid or restrain the members of the Federation from lawfully seeking and taking such employment, even though thereby members of the Union are prevented from obtaining such employment sought by members of the Federation, or are discharged by their employers and members of the defendant Federation employed in their stead; that said acts done and statements made by the respondents, or either of them, or on their behalf, as shown

by the evidence herein, were not done or made maliciously or for the purpose of hindering or obstructing the members of the Union, or any of them, or of preventing them from obtaining or retaining employment as musicians or otherwise, and that neither of said respondents, nor any person or persons on their behalf, sought to interfere with or obstruct the petitioner organization, or any member or members thereof, or prevent any member or members of the petitioner Union from obtaining or retaining employment, by threatening or suggesting the opposition of organized labor unions or their members in such a manner as tended or was calculated to cause any such employers or would-be employers, to fear or believe that trouble would be caused such employers or would-be employers by the Federation, its officers or members, or by other unions affiliated with the Federation of Labor or their members; that neither of said respondents, nor any person or persons on their behalf, did, or attempted to, interfere with, hinder or obstruct the members of the petitioner Union, or any of them, in obtaining or retaining employment as musicians, by representing or claiming to employers, or prospective employers that members of the Union were non-union men in such a manner as was calculated or would cause such employers or prospective employers to fear the opposition of respondents or any or either of them or organized labor of any of its branches, or individuals, or representatives or voluntary or incorporated associations; that throughout the disputes and controversies hereinbefore referred to, and the negotiations carried on between the respondents and the Cort Theatre Company, Frazee & Lederer and the Illinois Theatre, neither of the respondents, nor any person or persons on their behalf, represented that the musicians composing the said Quinn's orchestra, or any other members of the petitioner Union,

were non-union men; that neither of the respondents intended to violate the said injunctional decree by or through the acts done and statements made by them or either of them, or by any other person or persons on their behalf, in connection with the matters and things referred to in the said petition and the answer of the said respondents thereto, and that the acts done or statements made by the said respondents, or either of them, or by any person or persons on their behalf, as shown by the evidence did not constitute a violation of the said injunction.

The precise issue involved may be readily comprehended upon a consideration of the foregoing review of the proceedings.

It is practically conceded by appellant that if the findings of the chancellor are supported by the evidence, the order discharging the rule to show cause and dismissing the petition was not improperly entered, but appellant insists that the finding of the chancellor is not supported by the evidence and is against the manifest weight of the evidence.

It is a settled rule of equity practice that a court of review will not set aside the findings of fact by a chancellor who saw the witnesses and heard them testify, unless the error in such findings is clear and palpable. Sifford v. Cutler, 248 Ill., 340.

In Oehler v. Levy, 356 Ill., 178, it is said:

"So long as the injunction is in force it is the duty of appellee to observe it and to conduct his business strictly in accordance with the requirements of said injunctional order, but the court granting the injunction having determined, upon a consideration of all the evidence submitted, that appellee had not violated it, we are unable to say, from the record presented to us, that such determination is clearly and palpably contrary to the evidence."

It would serve no useful purpose to review the testimony of the several witnesses, as it appears in the record. It is irreconcilably conflicting. We have given it the careful consideration which it merits, and are unable to conclude that the findings of the chancellor are clearly and palpably wrong.

The order is affirmed.

ORDER AFFIRMED.

246 - 18385.

184 I.A. 453

MUSICAL LEADER PUBLISHING COMPANY,
a corporation,
Defendant in Error,
vs.
CAROLINA WHITE,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

The Musical Leader Publishing Company obtained a verdict and judgment in attachment in the sum of two hundred dollars against Carolina White for a balance due on a contract. The contract signed by Carolina White, plaintiff in error, was an agreement by her to pay defendant in error four monthly payments of $62.50 beginning with December 8, 1910, for her advertisement of three pages in the Musical Leader, to consist of one front page and two inside pages to be divided over the year. The attachment was in aid of the original suit, the affidavit setting forth said debt and the non-residence of plaintiff in error as grounds therefor. Plaintiff in error entered her appearance and in her affidavit of defense stated that defendant in error had failed to publish her advertisements as agreed, and that she was, therefore, entitled to a set-off for fifty dollars, the amount she had paid on said contract, but she did not traverse the affidavit or in any way deny that she was a non-resident of Illinois. Defendant in error denied in an affidavit of merits her claim of set-off and alleged that it had fully performed its part of the contract for printing.

Plaintiff in error introduced no evidence on the trial, and argues as a ground for reversal of the judgment that the evidence was not sufficient to make a case for defendant

in error upon either the attachment issue or upon the merits of the case. There was no issue made on the question of the non-residence of the plaintiff in error, and as to the attachment the defendant in error was entitled to a judgment by default. The evidence for defendant in error, even treating the matter to be at issue, is, however, sufficient in the absence of evidence to the contrary to prove that the plaintiff in error was a non-resident of Illinois. Charles T. French testified that she told him before the contract was signed that she was living in Italy and that "as soon as the season is over, we are going back to our home in Italy". He further testified, in substance, that he published in the Musical Leader more than three full pages of advertisements for plaintiff in error distributed over the year in a number of publications of the paper according to the provisions of the contract, which was also introduced in evidence, and that he furnished her enough of the publications for her to see that the contract was fulfilled by defendant in error. The evidence further showed that she was an opera singer, and that she was in Chicago at the Congress Hotel after the contract was signed during "the seasons" of 1910 and 1911, and that on January 24, 1912, she said to Herbert Gustavson, a law clerk for defendant in error's attorney, and who told her his business was to see her in regard to the claim in question: "I have written Mr. French about it; we are going away now, and my husband has written him. My husband has just written him a letter that I have given to the maid." The maid then gave Gustavson the letter which was signed by plaintiff in error's husband, Paolo Longone, which letter, so far as it refers to the matter in suit, reads as follows: "Regarding the contract of my wife, Carolina White, with your paper, it has displeased us exceedingly to have been obliged to post-

pone the payment of this contract,*****"

"My desire would be to pay one half of the sum due, $100 on April 30th and the remaining $100.00 on November 30th upon our return. If this meets your approval, will you kindly notify me, and oblige."

It was also in evidence that she paid fifty dollars on the contract long after the publications were concluded, and that on February 1, 1912, five days after the attachment writ was issued, she signed a power of attorney to her attorney, which instrument recites that "Carolina White of the City of Boston, County of Suffolk, in the State of Massachusetts," empowers Cairolo Gigliotti to sign bonds in her name. The foregoing evidence was ample proof that plaintiff in error was a non-resident of Illinois on the date of the attachment writ, as averred in said affidavit, and that defendant in error was entitled to a verdict and judgment in attachment and on the merits of the case, too. She was not shown to have any residence in Illinois at any time within the meaning of the attachment act.

Plaintiff in error also insists that the court erred in refusing to instruct the jury as to the meaning of the term, non-resident, within the meaning of the attachment act, and also erred in allowing her husband's letter in evidence over her objection that she did not write it. These objections are untenable and without merit. It is true that residence is largely a matter of intent upon the part of the one whose residence is in question, but there is no evidence in the record as to what plaintiff in error's intentions were at any time while in Chicago as to making a residence temporary or otherwise, nor as to how long or for what purpose she was there, and, therefore, it was not proper to have the jury consider that question. Had plaintiff in error desired to show that

her residence was in Illinois the issue on the affidavit should have been so made by a traverse, and the facts concerning her residence here, if any, put in evidence. As to the letter of her husband, the evidence clearly shows that she adopted it as her letter, and it was properly admitted.

There was no evidence tending to prove the claim of set-off, and, therefore, plaintiff in error was entitled to no instructions regarding the same. Under the evidence defendant in error was entitled to a directed verdict in its favor. There is no reversible error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

280 - 18320

OWEN MURPHY,
Plaintiff in Error,

vs.

GUNNING SYSTEM,
Defendant in Error.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

184 I.A. 454

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Owen Murphy sued out this writ of error to reverse a judgment against him in favor of defendant in error in a suit for personal injuries by him sustained. At the close of his evidence the court directed a verdict of not guilty and entered judgment accordingly.

The first count of the declaration charges, in substance, that he was employed by defendant in error to remove sign panels from a certain framework thirty feet high; that the weight of the panels necessarily in said work rested at times on a timber 2 x 4 inches at the top of said frame; that in removing said panels he was required to stand on another 2 x 4 at the rear of said frame work and near its top which was made for a foot rest while such work was being performed; that defendant in error negligently permitted said 2 x 4 timbers to be and remain in a dangerous and unsafe condition, old, rotten, worn out and cracked and insufficiently nailed to their attachments, and that the upper timber aforesaid had a large knot extending through it that weakened it, all of which the defendant in error knew or might have known by due care and of which plaintiff in error had not knowledge or equal means of knowledge thereof with defendant; that by reason of said negligence and while plaintiff in error was standing on said foot board and lowering a panel of said

sign board to the ground with a rope and hook as he was required to do, and while using due care, said foot board pulled loose from its attachments and threw him against and broke said upper timber and precipitated him thirty feet to the ground and severely injured and damaged him in the sum of fifteen thousand dollars. The second and third counts are similar to said first count, the second charging that plaintiff in error's injury was caused by the said defects in the foot board, while the third count charged that it was caused by the said defects of the upper 2 x 4 timber.

The evidence is, in substance, that the sign boards in question were erected on the east side of Blue Island avenue just south of its crossing at Sixteenth street; that said frame work consisted of two pine posts 4 x 6 inches and about thirty feet high put in the ground and braced by 2 x 6 inch timbers nailed to their tops and extending east and behind them about sixteen feet and there nailed to low posts planted in the ground; that there were six parallel 2 x 4 timbers about four feet apart nailed to the front or west side of the said upright posts to which the panels were nailed, one of which cross timbers was at the tops of the uprights; that the said 2 x 4 foot rest was nailed to the back or east side of the uprights, parallel with and about three feet below the top cross bar; that there were two sign boards on said frame, an upper and a lower, placed about five inches apart, the lower one being two or three feet above the ground, and each sign board consisted of about seven panels, each of which was about three to four feet in width and twelve to fourteen feet in length; that the panels were made of pine flooring nailed to three cleats 1 x 4 inches, the bottom cleat being so placed as to rest on the top of the lowest cross bar on which it was to be placed, but the top cleat remained several inches above the top cross bar; that the panels were placed side by side and nailed

to three cross bars with from nine to twelve nails driven in the face of each panel and of such length as to go through the panels and the cross bars and protrude on the rear about one-fourth of an inch, so that when the panels are to be removed the nails could be driven forward and drawn with a claw hammer; that when the panels were thus put up there was a frame work put around each sign board at top, sides and bottom consisting of timbers 2 x 2 inches and nailed to the sign boards in like manner as the panels were to the cross bars, giving each sign board the appearance of being framed like a picture; that the foot rest was not nailed to the sign boards, its only use being for a foot rest when the panels were being placed or removed.

The evidence further disclosed that plaintiff in error was twenty-seven years old and a sign hanger by occupation, and had worked at that trade about four years, the last seven or eight months of which he was in charge of the work in the field. January 14, 1908, he was directed by the foreman of defendant in error to go to the sign boards in question and to replace the wood panels thereon with new iron panels, and to examine the wooden panels there and if worth saving to save them, and if not to push them off to one side. He took with him two helpers, William Hutchinson and William Thiffault, and by direction of his foreman he took with him a wagon and team, an extension ladder, some cross bars, hammers, nails, a rope and hook, some 2 x 4 timbers and the iron panels. On arriving at the sign boards [illegible] in error climbed up the back of the frame work onto the foot board about three feet below the top 2 x 4, and Mr. Thiffault got upon the ladder on the front of the sign boards about the lower end of the upper sign board, which was the usual way they began the work. They first removed the frame work by driving the nails

forward and drawing them with hammers, and then plaintiff in error drove forward and drew all the nails except one in the top cross bar, while Thiffault drove forward and drew all the nails except two in the middle and lower cross bars of the top sign board. Plaintiff in error then fastened the hook on his rope behind the top cleat of the first panel, and then Thiffault said to him, "All right, Owen?" and plaintiff in error answered "yes", and pulled the last nail in the top cross bar, while Thiffault pulled the remaining two nails, one each in the other two cross bars, and Mr. Murphy let down the first panel by lifting it off the lowest cross bar and letting it down by the rope sliding over the top cross bar. The first panel being removed they proceeded to remove in the same way the next one, weighing about 125 pounds, and when its weight came on to the top cross bar the cross bar suddenly broke at a knot therein about the point where the center of the second panel was nailed to the cross bar, and plaintiff in error was thrown forwards and down on to the pavement and very severely and permanently injured. The cross bar and the frame generally were sound and without defects, except the knot on the cross bar which extended across the west face of the timber, and was about three inches long, leaving only about one inch of sound, serviceable timber at that point where it split and broke, and the entire knot was concealed by the panel nailed against it, as the knot did not show in either edge of the timber. The accident is thus described by plaintiff in error: "I got the hook in the second panel and after I got the hook in the cleat in this particular panel that I was going to let down, Bill Thiffault pulled the nail at the bottom and stepped to one side for me to leave the section go down, understand, and when I lifted it a little, the first thing I knew the foot hold begins to swing .

I lifted it a little, it lifts off the bottom 2 x 4, the cleat, and all of a sudden it lets me go down and I fell off with the sign. The rope was then resting on the 2 x 4 that broke. In letting the panel down I was leaning against the 2 x 4 that broke. The 2 x 4 came to about my chest or my stomach." He never removed or put panels on that frame before that day and knew nothing of the presence of the knot before he was injured. They took down the panels the day of the injury just in the usual and only way they were taken down. It was a part of his regular duty to look the frame work over to see what condition it was in as to repair, and he would repair it if it needed it and he had the proper materials on the wagon to repair it. If he had no proper material with which to repair it, he would report its condition to the company. Plaintiff in error, as well as all the other witnesses, testified that all the timbers looked black and were not painted, but that all of them were sound and seemed to be securely nailed. They felt solid under the men's feet and they carefully examined and went over all of them before the injury with a view to detect any defects or unsafe conditions and detected none, because the knot, the only defect, was hidden by the panel nailed to it. The foot rest moved slightly from the uprights by the nails slightly giving away just as the second panel was being let down to the ground. There was nothing wrong with the top cross bar that they could discover before the injury.

The defect or knot across the front or west face of the top cross bar of the frame work on which the new panels were to be placed by the plaintiff in error was a proximate cause of the injury in question, as appears from the evidence. To say the least, it could not be said as a matter of law that it was not a proximate cause thereof. Where two causes operate together

to produce or cause an injury, and neither alone would have caused such injury, both may be properly called proximate causes of the injury, if no other independent intervening cause may be said to be the proximate cause thereof. The fact, therefore, that the giving away of the foot hold may also have been a contributing cause of the injury, would not be a sufficient reason for saying the defect in the top cross bar was not a proximate cause thereof. Village of Canterville v. Cook, 199 Ill., 157; Elgin, J. & E. R. Co. v. Wilson, 217 Ill., 47; Diegel, Carter & Co. v. Irvin, 218 Ill., 559.

The real question in this case must necessarily be one of fact, that is, whether or not the plaintiff in error was guilty of contributory negligence. The defect in the top cross bar caused by the presence of a large concealed knot was one of original construction, and was not caused by decay, or by subsequent wear or giving away of the bar by reason of anything that has happened to it after the frame work was put up, although the frame was about six years old. It was no such defect as plaintiff in error was required or expected to anticipate, and the evidence tends strongly to prove that by the exercise of ordinary care he would not and that in fact he did not find the defect, because it was covered up with the panel nailed over it. It is the duty of the master or employer to furnish to his employe a reasonably safe place in which to work, and reasonably safe appliances with which to work, and he cannot relieve himself of that duty by delegating it to another. C. & A. R. R. Co. v. Meraney, 170 Ill., 520; Donk Bros. Coal Co. v. Thil, 208 Ill., 253.

After a reasonably safe place or appliance is furnished by the master he may impose the duty of inspection for subsequent defects by decay or by wear or by other causes, if the duty is simple and plain and the servant is clearly competent to perform

the same, and if such a duty is accepted by the servant, the master is relieved from any further duty of inspection for such defects. So the master may employ a competent servant to demolish or to make a well known dangerous place or appliance safe and in such case he can not be held liable, because such place or appliance is dangerous to such employe. T. & A. R. R. Co. v. Dragonier, 119 Ill., 91; Clark v. Liston, 54 Ill. App., 578; Labatt on Master and Servant, Secs. 39, 416, 416b, and 618.

The evidence in this case tends to show that the defect in the foot hold that caused the nails to slightly pull out was slight decay in the end of that timber. It being plaintiff in error's duty to inspect the frame and detect any dangers from decay, originating after the frame was constructed, and to repair or report such defects, the defect in the foothold, if caused by decay, was a defect for which he could not recover. That is to say, if the defect in the foot rest was the sole proximate cause of the injury, he could not recover. Neither could he recover if he was guilty of contributory negligence, either in failing to observe the defect in the top cross bar, or in failing to observe and repair the defect in the foot rest. If the jury should find that the defect in the foot rest was not a proximate cause of the injury, but that the knot in the cross bar was the sole proximate cause of the injury, then his negligent failure, if any, to discover the defect in the foot rail would not bar his recovery, and he would be entitled in such case to a verdict, unless he was guilty of contributory negligence in failing to observe the defect in the top cross bar. To bar his recovery on account of his own negligence, simply, it must appear from the evidence that his negligence contributed to his injury, i. e., be one of the proximate causes of his injury. All those questions were questions of fact that should have been submitted to

the jury.

We think there was sufficient evidence in the record to go to the jury on the question of whether or not the frame work belonged to, or was constructed by plaintiff in error, or at its instance. It directed the old panels to be removed and replaced with new ones furnished by it. Plaintiff in error testified that his boss was the man who had the work before, and that he certainly did know all about the signs, because he was around them all. This statement was unchallenged in any way, and while more proof, if available, should have been made of the ownership or construction of the frame, still we think the court erred in not submitting it to the jury. If the defendant in error constructed the frame in question or had it done, it was chargeable with notice of the knot or defect in the top cross bar as it was plainly visible when the panel was removed from it, and was necessarily plainly visible to the party or parties that used that timber in putting up the frame work.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

331 - 18371.

184 I.A. 472

HELEN SESTERHENN, Administratrix of the Estate of M.SCHAEFER, deceased,
Appellant,
vs.
JOSEPH SCHNEIDER, et al,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Judgment was rendered against Helen Sesterhenn, executrix of the last will and testament of Theresus Schaefer, deceased, and in favor of appellees in this suit for money had and received by them while officers of Drainage District No.1 of the Town of New Trier, Cook County, Illinois. This case, and two others of like character, were consolidated for hearing in this court with case No.18370, Schoden v. Schaefer, et al, and in which latter case the opinion was this day filed. For the reasons set forth in that opinion the judgment in this case is reversed and the cause remanded.

REVERSED AND REMANDED.

332 - 18372.

EGIDIUS MEYER, Appellant,	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
JOHN SCHAEFER et al, Appellees.	)	COOK COUNTY.

184 I.A. 472

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in this case in favor of appellees against appellant, Egidius Meyer, in a suit for money had and received by them to his use.

This cause and two others were consolidated for hearing in this court with case No. 18370, Scheden v. Schaefer, et al, in which latter case the opinion was this day filed.

For the reasons in that case assigned this judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

333 - 18373.

184 I.A. 472

ANNA HUERTER, Appellant,	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
JOHN SCHAEFER et al, Appellees.	)	COOK COUNTY.

MR.JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Anna Huerter appeals from this judgment in a suit by her for money had and received by appellees to her use. The judgment is reversed and the cause remanded in accordance with what is said in the opinion of this court in case No.18370, Schoden v.Schaefer et al, filed this day, with which case this one and two others were consolidated for hearing in this court.

Filed 7 Nov 1912

534

387 - 18433.

FRANK M. McKEY,
Appellee,

vs.

WILLIAM EMANUEL et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

184 I.A. 473

MR. JUSTICE BAUER DELIVERED THE OPINION OF THE COURT.

Frank M. McKey, trustee in bankruptcy of the estate of William Emanuel, filed his bill in equity in the Superior Court against said William Emanuel and Fannie Emanuel, his wife, to set aside an alleged fraudulent conveyance by the defendant, William Emanuel, to the defendant, Fannie Emanuel, of certain described real estate. The bill prays that said real estate be adjudged to be the property of said William Emanuel and not the property of said Fannie Emanuel, and that said Fannie Emanuel be ordered to convey said real estate to the complainant, as trustee, and that in case of her failure so to do, a master in chancery or some other proper person be appointed and directed to make said conveyance for and in behalf of said defendants, and for general relief. Upon the hearing the chancellor entered a decree, in substantial conformity with the prayer of the bill, and thereafter the said defendants prosecuted their appeal to this court. Several months following the filing of the record in this court, appellee filed his simple motion to transfer said appeal to the Supreme Court upon the ground that a freehold was directly involved.

No argument was advanced, or authority cited, by counsel in support of said motion, but counsel naively imposed upon the court the entire labor of considering and examining the question involved. Under such circumstances

and in view of the belated state of its docket the court deemed it inexpedient to devote the time necessary to original research upon the presentation of the motion, and the motion was, therefore, taken with the case.

The case having been reached for consideration, we find upon investigation that the precise question was involved and determined in Daly v. Kohn, 330 Ill., 436, where it is held that a proceeding by a trustee in bankruptcy to set aside a deed from the bankrupt to a third person involves a freehold. Further comment is unnecessary. This court being without jurisdiction to consider and determine the case the same is ordered transferred to the Supreme Court.

CAUSE TRANSFERRED TO
SUPREME COURT.

GEORGE E. HIBBARD,
Appellant,

vs.

JOHN B. MALLERS, Jr.,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

184 I.A. 474

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Appellant Hibbard as complainant filed his bill of complaint in the Superior Court, alleging that he and defendant Mallers, appellee here, were copartners from March, 1909, to May 5, 1911, on which day the copartnership was dissolved by the act and declaration of defendant. The bill prayed for an accounting, the appointment of a receiver and an injunction. The answer denied that the copartnership had been dissolved. The Chancellor on the hearing entered a decree that the bill be dismissed for want of equity and incorporated into the decree a finding of facts. Independent of the finding of facts the decree dismissing the bill for want of equity sufficiently shows that in the opinion of the Chancellor the copartnership was not dissolved, and in this opinion we concur. A finding of facts has no proper place in a decree dismissing a bill for want of equity.

The decree will be modified by striking out the finding of facts and as modified will be affirmed. Each party will pay one-half of the costs in this Court.

DECREE MODIFIED AND AS MODIFIED AFFIRMED.
EACH PARTY TO PAY ONE-HALF OF THE COSTS IN THIS COURT.

GEORGE THOMPSON AND SON COMPANY, a corporation,
Appellant,

vs.

THE HOLTZER-CABOT ELECTRIC COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

184 I.A. 475

MR. PRESIDING JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

October 5, 1909, appellant entered into a written contract with appellee to do the excavation and construct the brick walls of a certain building. The floors of the building were to be of concrete, laid by a contractor who made a contract with appellee, the owner, to do that work. The walls were carried up to the main floor and that floor was laid. There was to be a second story in front extending back fifty feet and a fire wall carried two feet above the level of the second floor on the rear ninety feet. The walls were carried up to the second story and that floor laid in November, 1909, when bad weather set in and the work was suspended until the following March. The architect notified appellant that the upper part of the walls were in bad condition and he must take down and rebuild such portions as were found to be bad. Appellant refused to obey the order of the architect and proceeded to carry up the walls without removing the bad portions. March 30 the architect terminated appellant's contract of employment and gave it notice of such termination. The architect completed the work appellant had contracted to do through another contractor and deducted from the contract price the amount paid to appellant,

the amount it cost to complete the work and for the balance issued to appellant his final certificate for $759.17. Plaintiff, claiming that he was entitled to recover on a quantum meruit $2798.60, brought his action against appellant in the Municipal Court. The court directed a verdict for the plaintiff for $759.17, overruled plaintiff's motion for a new trial and plaintiff prosecutes this appeal from the judgment entered on the verdict. Plaintiff called several witnesses, among them Church, the architect. The defendant offered no evidence. We find in the record no evidence tending to show that the architect acted fraudulently either in condemning a portion of the walls erected by the plaintiff or in completing the walls through another contractor. The contract provided that the contractor should take down all portions of the walls which the architect should by written notice condemn as unsound or improper; that except in case of a dispute as to the value of extra work, "Any controversy or dispute arising under this contract shall be settled by the architect, whose decision shall be final and binding on the parties hereto."

We think that this is but another of the many attempts that have been made to avoid the certificate of an architect given in pursuance of the provisions of a building contract providing that such certificate shall be final and binding on the parties, by submitting the question of the amount due to a jury, and that the trial Judge properly held that the architect's decision and certificate were conclusive and therefore properly directed the jury to find for the amount the architect decided and certified was due.

The verdict is free from error and the judgment is affirmed.

AFFIRMED.

J. A. GORE,
Appellee,

vs.

MARSHALL FIELD & COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

184I.A.486

MR. PRESIDING JUSTICE BAKER
DELIVERED THE OPINION OF THE COURT.

In trespass for false imprisonment by plaintiff Gore against Marshall Field & Company, a corporation, there was a verdict for the plaintiff for $500 damages and from a judgment on this verdict the defendant prosecutes this appeal. Plaintiff bought and paid for an overcoat in the basement of defendant's store and started to leave the store carrying the coat on his arm. He went up to the main floor and was about to pass through a revolving door to the street when a man standing near the door said, "Let me have the coat", and plaintiff, supposing that he was a doorkeeper who wished to assist him in passing through the door, gave him the coat. He noticed after he had passed through the door that the man had remained in the store and at once went back, took the coat from him, shook him and used language which he declined to repeat on the witness stand. The evidence does not show who this man was, nor that he was in the service of the defendant. Plaintiff never saw him at any other time and the witnesses for the defendant who testified that they then saw him also testified that they never saw him at any other time, and that he was not, to their knowledge, employed by the defendant. We think that the jury could not properly find the defendant liable for the acts or conduct

of this man.

Plaintiff went back to the basement with the man. He testified that when they reached the foot of the stairs the man had the overcoat and handed it to a man whom he identified at the trial as Kaatz, and said, "There is a coat this man was trying to get out with"; that Kaatz said, "What did you bring it to me for? * * * Take him to_____", mentioning a name that he did not catch; that he said to Kaatz that he had bought the coat and paid for it, and Kaatz replied, "You are accused of stealing this coat and you have got to prove that you did not steal it and get out of here"; that Kaatz asked him if he would know the man who sold him the coat if he saw him, and he said he did not know if he would; that Kaatz said, "Look for him" and he looked all around for the salesman, could not find him and then "wandered" back to where Kaatz and the other man were; that just then a man whom he identified at the trial as Cochran, a floor man, came up and asked what the trouble was; that the man who "carried" him down stairs said, "This man got away with this coat"; that plaintiff said he bought it and Cochran asked from whom he bought it and he said he did not know,that he could not see the clerk from whom he bought it, and Cochran said, "You have got to prove that you bought it", and he then said, "I have got his card"and took from his pocket the card of Mr. Brister; that Brister was at once called, came forward and stated that he had sold plaintiff the coat; that after some unimportant discussion with the employees of the defendant he left the store, taking with him the coat.

Much of the testimony of the plaintiff as to what occurred in the basement was contradicted. All of the witnesses called by the defendant who saw plaintiff when he came

down stairs testified that he had the coat when he came down to the basement and from that time until he left. Kaatz testified that when plaintiff and the other man came down to the basement the other man asked if he was the manager and he said no, that he was a salesman; that the man then said, "You hold on to that man; he stole that coat out of here"; that he replied that that was not his place; "if you saw that man take the coat you hold on to him. I have not seen a man take a coat and won't make myself liable." Cochran testified that he did not see plaintiff on the day of the trouble and did not tell him that the man with him was a watchman.

Blackstone says, "To constitute the injury of false imprisonment there are two points requisite. 1. The detention of the person. 2. The unlawfulness of the detention." If in this case there was a detention of the person it was unlawful. No crime had been committed, and to justify in an action for false imprisonment against a private person the defendant must show that a crime was committed.

Enright v. Gibson, 219 Ill., 550.

On the testimony of the plaintiff the question whether there was a detention of his person is not free from doubt. All that was said by any employee of the defendant, according to his testimony, was that Kaatz said, you have got to prove that you did not steal the coat and get out of here, and that Cochran said, you have got to prove that you bought the coat. If these statements or either of them can be construed as a statement that plaintiff must remain in the room until he had proved that he bought the coat, then the jury might find that plaintiff was detained; but if the statements are to be construed only to mean that plaintiff would not be permitted to take the coat from the

room unless he proved that he had bought it, then the jury could not properly find that plaintiff was detained. Plaintiff claimed the coat and if the defendant, by its servants, did no more than refuse to permit plaintiff to take the coat from the store unless he proved that he had bought it, if their object was to hold possession of the coat and not the detaining or restraining of the person of the plaintiff, then the defendant cannot, for such act and conduct, be properly found guilty of false imprisonment.

McClure v. State, 9 S. W. Rep. 353.

But if it be admitted that the question whether there was a detention of the person of the plaintiff was a question for the jury, the questions remain whether the court erred in refusing to instruct the jury at the request of the defendant that they should not under any circumstances award the plaintiff punitive damages, and whether the damages of $500 awarded by the jury are excessive. At most there was only a detention of the person of the plaintiff for a few minutes and there is nothing to show that the servants of the defendant acted maliciously or wantonly, or that their acts were conceived in a spirit of mischief or criminal indifference to civil obligations. We think that the case is not one for the awarding of punitive damages, or smart money, and that the instruction in question should have been given.

It is, we think, incredible that the actual damages of the plaintiff approximated the damages awarded him by the jury.

The verdict is reversed and the cause remanded.

REVERSED AND REMANDED.

314 - 18354

ERNEST D. McARTHUR,
Defendant in Error,

vs.

JOSEPH A. HOPSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

184 I.A. 487

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The judgment which this writ of error seeks to reverse is for $1000 and was rendered on the verdict of a jury in an action for alienation of affections. Ernest D. McArthur, the plaintiff, asserted in a "Statement of Claim" in the Municipal Court, that Joseph A. Hopson, the defendant, "caused and induced" Pearl McArthur, the plaintiff's wife, "to abandon the said Ernest D. McArthur and refuse to live and cohabit with him, and said defendant caused the said Pearl McArthur to take up an illicit cohabitation and dwelling with said defendant, by means whereof said Ernest D. McArthur lost the affection and society of his said wife."

The jury decided that the charge was well founded and rendered the verdict heretofore mentioned. The plaintiff in error makes among his assignments of error these objections to the judgment: 1st, that it is against the weight of the evidence. 2nd, that an instruction on the degree of proof required to sustain the plaintiff's case was erroneous in that it stated that "a preponderance of the evidence", instead of evidence sufficient to satisfy the jury "beyond a reasonable doubt", was enough to establish the plaintiff's case. 3rd, that "there was error in permitting plaintiff's attorney to ask a long series of

leading questions." 4th, that there was error in admitting in evidence a letter purporting to have been written by Pearl Mc Arthur to Ernest D. McArthur. 5th, that there was error in admitting in evidence a letter claimed to have been written by Pearl McArthur to the defendant Hopson; and 6th, that the court erred in admitting in evidence what purported to be a marriage certificate purporting to be signed by a Justice of the Peace of Milwaukee County in Wisconsin.

If the assumption is made that the marriage of the plaintiff to Pearl McArthur was sufficiently proved by the evidence or was admitted by the defendant's pleadings, concerning which we shall indicate our opinion in discussing the last objection noted, we could not undertake to say that the plaintiff's case was not sufficiently proved to justify the verdict of the jury. This disposes of the first objection we have listed, except as it may refer to the want of proof of the marriage.

The second objection is not well taken. A preponderance of evidence was sufficient to establish the plaintiff's case. In our opinion, in a civil case it is only when a verdict against the defendant requires that the jury should find him guilty of "an infamous crime" that the law of this State demands proof "beyond a reasonable doubt."

See Solomon v. Buechele, 119 Ill. App. 593, and cases therein cited, and Crane v. Schaefer, 140 Ill. App. 647; also Miller v. Balthasser, 78 Ill. 302.

The third objection we need not discuss in view of our decision as to the remaining objections. The same leading questions at least are not likely to be asked in another trial. The control of this matter is largely in the discretion of the trial court.

The fourth objection is, in our opinion, well founded in that it was error to admit the letter specified. But we do not regard it as an error requiring reversal, because we can not see how it could have injured the defendant or benefitted the plaintiff.

But the fifth objection we regard as fatal to this judgment. The error in admitting this letter against Hopson is undoubted under the doctrine laid down by our Supreme Court in Razor v. Razor, 149 Ill. 621. See also Jones v. Jones, 124 Ill. App. 201.

It is insisted in behalf of the plaintiff that this letter, written by Pearl McArthur to the defendant and found in his possession, is shown by proof "aliunde the letter itself" to have been "adopted or sanctioned by some reply or statement or act" on the part of the defendant. We do not think that it appears from the evidence that the acts of fondness between the parties had any reference or relation to this letter.

It would be more to the purpose perhaps to say that the letter by itself, like the letter from Pearl McArthur to her husband, was probably without influence on the verdict; but aside from the fact that it was a matter which might have been pressed insistently on the jury as a factor in determining the credibility of witnesses, it must be noted that the plaintiff himself seems to have regarded it as very significant proof of his wife's infidelity. It was not until he had found and read it that he manifested any great resentment on account of his wife's remarkable relations with Hopson.

As to the sixth objection noted, it may be considered doubtful if there was any competent and sufficient evidence of marriage between the plaintiff and Pearl McArthur presented at

the trial. In Keppler v. Klaer, 23 Ill. App. 643, this Court held in an action for criminal conversation, that the plaintiff's speaking in his testimony of the woman involved as "my wife", was no evidence of a marriage, being a mere acknowledgment of a relation, not proof of an actual marriage. In the case at bar, however, the plaintiff in answer to direct questions said that he was married to Pearl McArthur on Feb. 2, 1908, at Milwaukee, Wisconsin. Perhaps this, in the absence of contradiction, would be sufficient evidence of a ceremonial marriage if the plaintiff had stopped there, but he proceeded to put in evidence (over objection) a certificate by a Justice of the Peace in Milwaukee County, Wisconsin, which in connection with his testimony showed that the ceremony of marriage he was referring to was before one J. W. Hart, Justice of the Peace in Milwaukee County. It may be considered, as we have said, that the presentation of this certificate in connection with his testimony was equivalent to his testifying to this fact; but the certificate itself is not evidence of the official character of the Justice or of his right to perform a marriage ceremony, or that the ceremony was performed, and was not admissible as such evidence. At the best it must be said therefore, that the evidence of the marriage which is essential to the recovery in this class of cases was very scanty. As we hold the introduction of the letter last described as by itself reversible error, we do not rest our decision on this scantness of proof. If we could take judicial notice of the rules of the Municipal court we should have no difficulty in holding, as defendant in error argues, that the state of the pleadings shows a practical admission of the marriage by the defendant and that he cannot now be heard to question it. But the Supreme Court has said in its

opinion in Sixby v. Chicago City Railway Company, 240 Ill. 478, that the Appellate Court cannot in any case coming from the Municipal Court take judicial notice of the rules of that Court nor consider them unless they are made part of the record by a bill of exceptions. They are not so made a part of the record in the case at bar.

The judgment of the Municipal Court is reversed and the cause remanded to that court.

REVERSED AND REMANDED.

h Term, 1912, No.
337 - 18377

EDWIN NELSON, a minor, by next friend,
Appellee,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

184 I.A. 489

STATEMENT BY THE COURT.

The plaintiff in this action, who is the appellee in this court, a minor, recovered on January 27, 1913, a judgment in the Superior Court for $10,000 against the defendant corporation for an injury - the loss of a leg - suffered as he charges through the negligence of that corporation's servants. The judgment was on the verdict of a jury.

The declaration in the case, on which it went to the jury, was of three counts. The first count charges that the defendant was at the time of the accident (January 9, 1910) a common carrier of passengers and that the plaintiff was a passenger on one of the defendant's trains and had paid his fare as a passenger; that at Auburn Park station it was the duty of the defendant to bring its train, and particularly the car the plaintiff was on, to a full stop and keep said train at a full stop long enough to enable the plaintiff to safely alight, "but that while the plaintiff was with all due care and caution for his own safety * * in the act of stepping from the front platform of the said car * * the defendant * * negligently and without warning to the plaintiff caused the said car to be suddenly and violently started * * without bringing the same to a full stop and standstill for a sufficient length of time so that the plaintiff might safely alight therefrom; by means whereof the plaintiff was thrown to the ground there from and off the front

platform of said car and under the wheels of the said train of cars" and injured. The second count has the same recital as to the defendant's character as a common carrier and the plaintiff's status as a passenger, but alleges as the negligence that the defendant negligently permitted snow and ice to accumulate on the platforms and steps of the car the plaintiff was in, and allowed them to remain there, having actual or constructive notice of the condition, and that while the defendant was a passenger and after the car had come to a full stop and standstill at Auburn Park station and the plaintiff was rightfully upon the steps of the front platform of the car and about to step off from said platform and steps to the station, the train and car suddenly and violently started, whereby and by reason of the negligence of the defendant in allowing snow and ice to accumulate on said platforms and steps the plaintiff, although in the exercise of due care, unavoidably slipped on said snow and ice and fell from and off the front platform and steps of said car to the ground there and under the wheels", etc. The third count (added by amendment to the original declaration before trial) alleges as to the status of the plaintiff merely that he was a passenger on the defendant's car without asserting that he had "paid his fare", and asserts that the defendant "so carelessly and improperly drove and managed the said train of cars and the car upon which the plaintiff was a passenger that by and through the negligence and improper conduct of the defendant in that behalf, while the plaintiff was in the exercise of due care and caution for his own safety, the said plaintiff was thrown off of said car upon which he was a passenger without warning to him of any kind", and "to the ground there from and off the platform of said car and under the wheels of said train of cars", etc.

The defendant pleaded the general issue. The

objections made to the judgment by the defendant and argued by it in this court are:

First, that the verdict is against the weight of the evidence.

Second, that the court below erred in not giving a peremptory instruction for the defendant at the conclusion of the evidence for the plaintiff or at the conclusion of all the evidence.

Third, that the court erred in giving certain instructions which recognized the character of the plaintiff at the time of the accident as a passenger on the train of a common carrier and declared the duty of a common carrier to a passenger to be to exercise the highest degree of care and skill consistent with the practical operation of its road, thus ignoring a controlling fact in this case - that the plaintiff was riding on a pass which contained this stipulation:

"By the acceptance and use of this ticket any and all claims on this company, whether due to negligence of its agents or otherwise, for injury to the person or loss of or damage to the property of the holder are waived and released, and he agrees to identify himself whenever requested. The company reserves the right to recall or take up this ticket at any time. I accept the above conditions."

Fourth, that the court erred in giving an instruction that the fact that the plaintiff was using a pass with the said stipulation would not in itself relieve the defendant from liability if at the time the plaintiff was a minor.

Fifth, that the court erred in giving the following instruction concerning preponderance of evidence. For convenience of reference hereinafter, we denominate it No. 1.

"The jury are instructed that the plaintiff must establish his case by a preponderance of the evidence. This preponderance, however, is not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is the jury should take into consideration the op-

portunities of the several witnesses for seeing or knowing the things about which they testify; their conduct or demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witness and the parties; the apparent consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial; and from all these facts determine upon which side is the weight or preponderance of the evidence."

Sixth, that the court erred in giving the first two of the three instructions following (which first two for convenience we denominate instructions Nos. 3 and 4 respectively) and in refusing to give the last one of the three (which we denominate Refused Instruction A). As they pertain to the due care required of the plaintiff to enable him to recover, we group them together.

"INSTRUCTION 3. The court further instructs you that before you can find against the plaintiff on the ground of contributory negligence you must believe that the plaintiff did not use such care and caution as a person of his age, intelligence, judgment and experience would have ordinarily used under the circumstances surrounding him at the time."

"INSTRUCTION 4. The jury are instructed that the ordinary care required of the plaintiff as defined in these instructions is such care as an ordinary prudent person of the same age, intelligence, experience and capacity would exercise under the same or similar circumstances."

"REFUSED INSTRUCTION A. Ordinary care is that degree of care which a reasonably prudent person would exercise under the same circumstances and conditions."

Seventh, that there is a variance between the allegations of the declaration and the proof, in that the allegation in each count is that he fell under the wheels of the train at Auburn, while the proof is that he so fell about a thousand feet south thereof.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

We have carefully considered the evidence in this cause with reference to the contention vigorously made by the defendant that the weight of the evidence is so clearly against the verdict and judgment that we should set them aside, and are unable to agree with it. The question whether the accident happened as the material allegations of the declaration said it did, because of conditions which involved the fault of the defendant's agents, or in a different way, involving the plaintiff's own negligence only, was a fair one for the jury, and after giving all due weight to the arguments urged by the defendant's counsel we do not find such inherent improbabilities in the plaintiff's story of the accident as to justify us in holding that the credence which the jury showed by their verdict they gave it should be held unwarranted. Under these circumstances it would be useless for us to discuss in detail the testimony. No eye witness of the accident but the plaintiff testified. Nor do we consider that there was definite contradiction in the evidence offered by the defendant of anything which the plaintiff stated. Undoubtedly the defendant was at a disadvantage in that the accident was, so far as it was concerned, apparently "a blind one", in the parlance used in such cases - one in which no report was made and in which no eye witness was available for their investigation; but this would not justify us, under the evidence as it appears in the record, in setting aside the decision of the jury on the facts.

A more difficult question is presented to us by the argument that under the conditions of the pass on which the plaintiff was riding he was not a passenger on the defendant's train in the sense that required the defendant to exercise

towards him the highest degree of care consistent with the practical operation of the road, but was a mere licensee, to whom the railroad company was liable for an accident like this only for negligence so gross that it must in the eye of the law be called wilful, and by the further proposition that by the acceptance and use of the pass the plaintiff must be held, in accordance with the language of the conditions on its back, to have "waived and released" "any and all claims on the company, whether due to negligence of its agents or otherwise for injury to the person."

Because of the proven use by the plaintiff of the pass with this condition upon it, the defendant maintains the court should have peremptorily instructed the jury for the defendant, and failing in that, should not have given the instructions described in the third and fourth objections of the defendant indicated in the statement prefixed hereto.

Unless prepared to admit that the court was wrong in its decision and in the reasoning of the opinion in Pennsylvania Company v. Purvis, 128 Ill. App. 367, we must hold these positions of the defendant in the case at bar not well taken. It is the contention of the defendant that the court was wrong in the Purvis case. It challenges the positions that the pass with its conditions was a contract and that the bringing of the suit was a disaffirmance.

But even on the assumption - which we do not make - that the theory upheld by the court in the Purvis case as to the disaffirmance of the contract was incorrect, we do not assent to the defendant's contention in regard to the pass described in this case. In our opinion it was not, as maintained by the defendant, a mere gratuity, a free gift or a free license - as it is variously called in the argument.

A copy of the pass, except that presumably the blanks indicated in the copy were filled up with the proper names and terms in the original used by the plaintiff, was introduced in evidence and on its face read as follows:

"Rock Island Line,
1910 Employes Quarterly Pass.
Pass_____
Between
Chicago and_____
Account_____
Not good on Trains 3, 4, 7, 8 and 11.
Void unless countersigned by L. C. Seward
or D. L. Greitz.
Countersigned:_____ H. A. Mudge,
President."

Around and beneath this text were numbers, each in a small line square like this [1] from 1 to 194. These numbers were to be punched out as the pass or ticket was used on each trip taken on it. Thus by it the employe was furnished with transportation to and from Chicago to the single place mentioned in the pass each day for 97 days.

The plaintiff was an employe of the defendant company. He was "a general utility man" for the company, he says, "but his position on the books was as baggage man". He worked on the main floor of the defendant's station in Chicago on Van Buren street in the baggage room. He lived at 8016 Normal avenue, which is near the Auburn Park station of the road at 78th street, eight or nine miles from the place of his daily work.

The testimony of one Lorenz, employed by the defendant company in the office of its superintendent, and that of one Greitz, employed in the President's office, prove (as indeed the printed blank does) that the bestowal of this pass was not an isolated or sporadic incident of an accomodation of a particular man, but part of a system of the relations of the road to its employes which had been continued for many years.

It is practically conceded - at all events we hold it

true - that the law of Illinois renders invalid as against "a passenger for hire or consideration, the exemption or waiver and release from liability for negligence which appears on the back of the pass involved in this case in these words:

"By the acceptance and use of this ticket any and all claims on this Company, whether due to negligence of its agents or otherwise for injury to the person * * of the holder, are waived and released." * *

Illinois Central Railroad v. Beebe, 174 Ill. 13.

The question therefore arises, irrespective of the infancy of the plaintiff, whether this employe, living upon the line of the road and going to and from his work each day on a coupon pass issued by the Company to its employes in accordance with a recognized system, was not "a passenger for hire" and "for consideration"? We think he was.

The circumstances of the issuance and use of the pass in Doyle v. Fitchburg Railroad Company, 166 Mass. 492, did not differ from those in the case at bar, and the reasoning of the Court commends itself to us when it says -

"It fairly may be said in this cause that the ticket formed a part of the consideration by which the plaintiff's intestate was induced to enter and continue in the employment of the defendant and was not a mere gratuity. The ticket was only given to employes and not to all of these, but, so far as appears, only to such as worked in Boston and lived on the line of the railroad in some other place. It had reference, briefly, to special circumstances attending the performance of services for the Company and the arrangement well may have been regarded as mutually advantageous. By it the defendant was enabled to obtain the services of those who did not live in Boston and thus to draw its employes from a larger body, subject only to the expense of their transportation, and the plaintiff's intestate was enabled to enter the defendant's employment on equal terms as to wages with those living in Boston. Without speculating as to what the rights of the plaintiff's intestate to the ticket would have been if at any time he had left the defendant's employment before the end of the month, we think it plain, as already stated, that as this case stands the ticket properly cannot be regarded as a gratuity.

Counsel for appellant in the reply brief, commenting on this case and others, say there is no evidence in the case at

bar that there was consideration for the pass, and that it was a matter of proof, the burden of which was upon the plaintiff. If such proof had been attempted, they say -

"We might have been able to show, among a great many other things, that all of the employes of the Rock Island do not live upon its line, and yet there is no difference in the pay of those who must pay for their transportation and those who ride on the Rock Island free."

We think that which was shown raised the presumption that the pass was no mere gratuity, but a thing for which the defendant company received consideration. Certainly if it had been shown by the defendant that "there is no difference in the pay of those who must pay for their transportation and those who ride on the Rock Island free", it would still be undoubtedly true that the defendant was enabled "to draw its employes from a larger body, subject only to the expense of their transportation."

The words we have italicized in the quotation from Doyle v. Fitchburg Railroad Company, supra, might all be omitted without in the least disturbing the argument that there was a consideration for the pass. Indeed notwithstanding what is said in the opinion the statement of the bill of exceptions in the Doyle case as given in the report is -

"There was a well known and uniform custom of the defendant known to Cornelius J. Doyle to furnish to its employes who worked at Boston and lived at some other place on the line of the road a ticket in the form hereafter set forth. The rate of wages paid to the defendant's employees for a given class of work was the same, whether the employe resided at the place where he worked, or at some other place on the line, and he was furnished with one of the aforesaid tickets."

There are other authorities holding an employee's pass not a gratuity, the reasoning of which we think is applicable to the case at bar, and which we think can not successfully be distinguished from it in material matters. Among them are:

Hebert v. Portland Railroad Company, 103 Maine, 315;

Railway Company v. Stevens, 95 U. S. 655;

Williams v. Oregon Short Line R. Co., 18 Utah, 210;

McNulty v. Railroad Company, 182 Pa. St. 479.

Indeed we do not think that the principle involved in the long line of "stock pass cases", so-called, is really very different from that involved here.

The Supreme Court of Tennessee, going further than is necessary for the decision of the case at bar, has asserted - citing authorities which it deems applicable - that -

"The weight of authority and of sound policy we think is that where a servant performs all his work at a fixed place and the master either by custom or gratuity carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger."

Transit Co. v. Venable, 21 Tennessee, 460.

If the plaintiff's pass was not a gratuity, and he was a passenger in the sense of being a "passenger for hire", as we think he was, then, as we have heretofore indicated, the contentions of the defendant, based on the conditions printed on its back, are not well taken.

Instruction No. 1 is vigorously attacked by the appellant. We do not think that the Supreme Court has ever reversed a judgment on the ground of this instruction alone, and we are not willing to do so. The Supreme Court has said that it "can not be said that the Court has given its unqualified approval" to it, or that it might not be misleading in certain cases, and it has (E. P. & E. Ry. Co. v. Lawler, 229 Ill., 621) animadverted on it in cases reversed for other reasons; (Lyons v. Ryerson, 242 Ill. 409) but it refused to reverse on account of this instruction in the Lawler case and in Dering et al. v. Parsak, 227 Ill. 71.

Nor do we think that taken together the instructions

upon contributory negligence or the preponderance of proof concerning it could have misled the jury or require a reversal at our hands, although we do not regard the phrasing of instruction three as commendable.

The refusal of instruction A. was not, in our opinion, error; nor do we think the position of the appellant concerning an alleged "fatal variance between the allegations of the declaration and the proof" needs discussion. We recognize no such variance. But if there was one it was not made the subject of an objection or comment in the Court below, which is fatal to its consideration here.

The judgment of the Superior Court is affirmed.

AFFIRMED.

FREIDA GAUGER,
Appellee,

vs.

AMERICAN PATRIOTS,
Appellant.

APPEAL FROM THE COUNTY COURT
OF COOK COUNTY.

184 I.A. 490

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The appellee in this case recovered a judgment in the County Court of this County, February 5, 1912, for five hundred dollars against the appellant, a fraternal insurance corporation, on a benefit certificate issued by said appellant, which provided that:

"In consideration of the warranties contained in the application of Friedrich Gauger for membership in Council 640 of Chicago, Illinois, which are made the basis and a part of this contract, the American Patriots hereby accepts this applicant as a member of said council and promises to pay out of its Benefit Fund Five Hundred Dollars to Freida Gauger, wife, as Beneficiary or Beneficiaries, as provided by the constitution and laws of the American Patriots regulating the payment of benefits, upon satisfactory evidence of the death of said member and upon the surrender of this certificate."

The italics are ours. We merely use them in this and subsequent quotations from documents appearing in the record to call attention to the words affecting the question on which this appeal, as we view the matter, must turn.

This certificate is dated December 28, 1908, and bears a notation that it was delivered March 2, 1909. It also bears the following undertaking of Friedrich Gauger:

"I hereby accept the above certificate on the conditions named herein and warrant that I am in good health.
Friedrich Gauger."

Friedrich Gauger seems, previous to the date of this certificate, to have been a member of a society called the Bankers Endowment and Mutual Association of Chicago. This associa-

tion seems to have "reinsured" its members, or some of them, with, or transferred them to, the American Patriots, for there is no formal application of Friedrich Gauger for membership in the latter body shown except the following (without date), which was introduced by the defendant company in evidence in this case as "the application for membership made by Friedrich Gauger to the American Patriots":

"Contract No. 21666. (Made in duplicate, one copy to be filed with the American Patriots and the other to be attached to the member's certificate.)

In consideration that the member of the Bankers Endowment and Mutual Association of Chicago, whose signature appears below, hereby warrants that the undersigned is now of sound mental and bodily health and that the undersigned will pay to the American Patriots a monthly assessment of the same amount as he or she has been paying to the Bankers Endowment and Mutual Association, the American Patriots of Springfield, Illinois, hereby accepts said person as a member, and agrees to pay in accordance with the constitution and laws of the American Patriots all the legal benefits promised in certificate known as No. 777 issued by the Bankers Endowment and Mutual Association of Chicago, Illinois. In witness of the acceptance of the terms of this contract the officers of the American Patriots and the member have hereunto affixed their names and the seal of the American Patriots has been attached this day.

American Patriots,
(Corporate Seal.) by C. Q. Thorpe, President,
W. H. Taylor, Recorder,
Friedrich Gauger, Member."

An officer of the appellant society testified in effect that this document was made during December, 1904.

In 1909 Friedrich Gauger was suspended from the order, and under date of April 18, 1909, signed the following document, on which he was duly reinstated as of that date:

"American Patriots, Springfield, Illinois.
Original Schiller Council No. 630.
Application for Reinstatement. April 18, 1909.

I, the undersigned, a suspended member of Council No. 630 of the American Patriots, holding Certificate No. 21666, accepting all the provisions of the constitution of the order now in force, do hereby ask to be reinstated and warrant that I am in good health and not engaged in any occupation prohibited by the constitution of the order and that except * * * * I have been free from all bodily injuries and ailments since the date of said certificate and ask that this warranty be attached to my original application for membership and that it become one

of the warranties upon which my insurance in said order is based, hereby waiving inquiry by the society in respect of the foregoing warranted declarations.

I have attached duplicate of this warranty to my benefit certificate.

Fritz Gauger.

Witness:
P. B. Singer."

April 21, 1910, Friedrich Gauger died of tatanus, being then a prisoner in the House of Correction of Chicago (commonly known as the Bridewell), to which institution he had been committed by the Municipal Court of the City of Chicago April 15, 1910. He had been found guilty by said court of a violation of an ordinance of the plaintiff against disorderly conduct and fined fifteen dollars and costs. Default having been made in payment, it was ordered by the court -

"That the defendant stand committed to the House of Correction of said City of Chicago until the whole of said debt and costs shall have been worked out * * * * * and that during the imprisonment of said defendant in said House of Correction he be required to labor under the direction of the Superintendent of said House of Correction and according to the rules of said House of Correction and the Bailiff of this court is hereby commanded to take the body of said defendant Fred Gauger from the bar of this court and deliver said body to the Superintendent of said House of Correction, and the Superintendent of said House of Correction is hereby commanded to receive the body of said defendant Fred Gauger into his custody and confine said defendant in said House of Correction at labor from and after the delivery of said body to said Superintendent until such debt and costs shall have been worked out * * * * * or until said defendant shall have been discharged according to law, provided said imprisonment shall not exceed six months."

This order was carried out and it was while Friedrich Gauger was in custody under it that he died, as before stated.

Proof was made of the death and payment demanded of the defendant society, but the claim was rejected. Suit was then brought. The defendant society pleaded the general issue, also that the certificate was avoided because the defendant suffered from the tetanus from which he died in consequence of a suicidal attempt upon his own life in violation of thee constitution of the order and the contract; also that the reinstatement of Gauger in the order was invalid because of his age

when reinstated; also that the suit was not brought in time, and, finally, that the said Friedrich Gauger had agreed for himself and his beneficiary that the constitution and laws of the defendant society should be a part of his contract; that Section sixty-five of the constitution of the defendant order was in force at the time he became a member and at all times thereafter, as follows:

"Sec. 65. If a member dies in consequence of a duel or by the hands of justice or by the practice of any pernicious habit that obviously tends to shorten life or by the use of intoxicating liquors or drugs, or through or by the violation of any criminal law of any state, or while in the custody of any officer of the law, then in all such cases the certificate of membership shall be null and void, but the Board of Directors, if in its judgment the circumstances attending such death warrant it, may at its option, without prejudice, pay any sum not exceeding the full amount thereof";

and that at the time of his death Gauger was in the custody of an officer of the law, which rendered the certificate void. The plea, which was inartificially drawn, also asserted that the certificate was void because Gauger was addicted to the use of intoxicating liquors to excess, which tended to shorten his life. Having denied by replications previously filed the substance of the other pleas, to this last plea the plaintiff filed a replication in which she denied "that Friedrich Gauger was in the custody of an officer of the law when he died", and then added the assertion that said Friedrich Gauger did not die from the use of intoxicating liquors or drugs.

The cause was submitted to a jury. After the evidence (which established the Section of the Constitution numbered 65 and set out in the plea before described) was all in, the defendant moved for a peremptory instruction. It was refused, and the cause went to the jury with instructions practically calling attention to the defence of suicide only, although the following instruction was given at the instance of the defendant:

"The court instructs the jury that the constitution, the by-laws of the defendant and the membership certificate issued to Friedrich Gauger by the American Patriots must be construed together as one contract and the laws of the defendant in force during the time said Friedrich Gauger was a member of the defendant order were binding on him and are also binding on the beneficiary, the plaintiff in this suit."

Assuming that all other matters of defence raised by the defendant were properly decided against it, as indeed we think they were, we see no way in which the provision of the constitution that "if a member dies * * * while in the custody of any officer of the law * * * the certificate of membership shall be null and void" can be ignored; nor can we see why it is not applicable to this case.

By virtue of the certificate itself and its acceptance and the application for reinstatement, this provision or condition, we think (as the Judge ruled) was a part of the contract made by the parties.

The answer made by the plaintiff to this defence in the court below was that the proper construction of the Section would not make it applicable. With this the trial Judge agreed, remarking that he did not think "or while in the custody of any officer of the law" "would mean technically being in the custody of an officer of the law, because", as he said, "I can see where one of the most innocent and sober men in the country might be in the custody of an officer and might die in his custody." We do not follow this reasoning. The statement of the trial Judge as to the possibility of an entirely innocent and sober man being in the custody of an officer of the law and therein dying, is of course true, and it may show the condition both a harsh and unjust one and an unwise one for the deceased to have entered into; but we do not see how we can change the contract or make another for the parties.

In argument in this court the plaintiff says that the provision should not prevent the recovery because there is no causative connection between the custody and the death. This statement of fact is true also, but it is not a part of the contract that there should be such a causative connection. And we know of nothing which prohibited the parties from making the contract, which, considering the Section of the Constitution involved, we must hold that they did make. That Friedrich Gauger died while in the custody of an officer of the law was undeniable, we think, and this should have prevented recovery. The peremptory instruction asked for by the defendant should have been given, and we must reverse this judgment without remanding the cause.

REVERSED.

383 - 18428. GAUGER v. AMERICAN PATRIOTS.

FINDING OF FACT.

Friedrich Gauger died while in the custody of an officer of the law.

CALVIN W. BURKET,
Appellee,

vs.

THE URES CONSOLIDATED MINING COMPANY, CHARLES A. WINSTON, W. R. MACDONALD, JOHN H. TURNER and P. D. MINICK, On Appeal of JOHN H. TURNER, CHARLES A. WINSTON and P. D. MINICK,
Appellants.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

184 I.A. 491

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

The principal contention of appellants in this case is that the verdict on which the judgment attacked by the appeal was based was clearly and manifestly against the weight of the evidence. The judgment was rendered by the Municipal Court of Chicago January 5, 1912. It was for $4508.27 and costs. It was in favor of Calvin W. Burket and against Charles A. Winston, W. R. Macdonald, John H. Turner and P. D. Minick. Of these Winston, Turner and Minick have appealed to this court.

The suit was brought on a promissory note reading:

"Chicago, Illinois, March 16, 1906.

On or before one year after date the undersigned, The Ures Consolidated Mining Company, promises to pay to the order of Calvin W. Burket the sum of Four Thousand Dollars ($4000.00), with interest from date at the rate of eight per cent. per annum, until paid, for value received. This note may be extended if desired for a further period of two years upon payment of interest.

The Ures Consolidated Mining Company,
By John H. Turner, President,
W. R. Macdonald, Secretary,
C. A. Winston,
W. R. Macdonald,
John H. Turner,
P. D. Minick."

(SEAL
The Ures Consolidated
Mining Company.)

The note was given before the statute of Illinois known as the Negotiable Instrument Law, approved June 5, 1907,

went into effect. Considering the wording of the note, Section 64 of that Act, were it applicable, might have determined the prima facie relation of the appellants to the paper to be that of endorsers only; but there is no doubt that before that statute was enacted they were, on the face of the instrument itself, either principal makers or sureties. The evidence, which in that respect is not conflicting, shows that they actually signed as sureties, and perhaps without any further evidence the fact that the body of the note describes the Ures Consolidated Mining Company alone as the promisor would have fixed their relation as sureties rather than principals. This, however, is immaterial. The Ures Consolidated Mining Company was not served in this case, and while judgment was rendered as well against W. R. Macdonald as the other individual defendants, he has not joined in the appeal.

The conflict of evidence is not as to the character in which the appellants and Macdonald signed, but as to the conditions on which their undertaking as sureties was to become effective in favor of the payee, Burket, and whether the condition, if such there were, between themselves was known to Burket. The appellants say that their undertaking to become sureties for the debt of The Ures Consolidated Mining Company was only to become valid and effective if all the directors of that company signed the note, and that this condition was made known to and was understood by the plaintiff; that there were nine directors, of whom only four signed the note, and that, therefore, Burket should not be allowed to recover against these four.

It is quite true that there is very distinct testimony of several witnesses to the condition named and to knowledge of it by Burket. But we do not think it is a case in which we

should override the decision of the jury on the question whether that testimony or that of Burket, who testified emphatically that he agreed to make and did make a loan to the Company of the amount mentioned in the note, provided that he could have the security afforded by the personal obligation of some of the directors. "There was never anything said", he testifies, "about all the directors signing - not one single word said to me about a requirement of all the directors signing that note."

The conflict is irreconcilable. But it might well be that the persons signing expected that all of the directors would sign without its being a condition made known to or expected by Burket. Such an expectation by them would not invalidate in Burket's hands the signatures that were actually made. At all events, we are content to let the decision remain as the jury made it. They were only instructed that they should find for the defendants if they believed from the evidence that the defendants signed the note upon the condition that they should not be personally obligated unless all the directors signed, and that this condition was understood by the plaintiff. They did not so find.

The appellants maintain that the testimony for the defendants not only preponderates in the number of witnesses, but that the testimony of their witnesses is corroborated and that of the plaintiff is not. We do not assent to this proposition. It seems to us a fair matter of argument to and inference by the jury that the circumstances attending the making of the note, its delivery to and acceptance by the plaintiff, his making the loan without requiring an attempt to secure the lacking signatures, the unanimous ratification of the loan "as secured by Mr. Macdonald from Dr. C. W. Burket" at a meeting of the directors at which all the appellants were present, when they knew

that Turket had the note and had delivered the money, and the subsequent inactivity in repudiating or denying liability for a long time thereafter, were corroborative to some extent of the plaintiff's testimony. How far they were so corroborative or should be regarded as controlling, was for the jury and not for us to say.

The only other point made by the appellants against the judgment is that it includes interest from date at the legal rate of five per cent. Their contention is that the rate reserved in the note was usurious, and that although a corporation could not take advantage of the forfeiture of the entire interest provided by the usury laws of the State as a penalty, but must be held liable for legal interest in addition to the principal, yet individual sureties on a promissory note executed by a corporation may plead and take advantage of such forfeiture.

The jury were instructed to this effect by the Court at the instance of the defendants, but disregarded the instruction. We think the instruction was erroneous and the jury right, and that the appellants cannot take advantage of the disobedience by the jury of an erroneous instruction given at their instance.

Corporations are expressly by the statute of Illinois forbidden to interpose the defence of usury, but cannot nevertheless be held liable for more than the legal rate.

Union National Bank vs. Louisville, New Albany & Chicago Railway Company, 145 Ill. 206.

In other states with similar statutes sureties are no less forbidden the defense of usury than the corporation itself, and are thus placed in the same situation as such corporation.

Freese v. Brownell, 35 N. J. L. 285;

Rosa v. Butterfield, 33 N. Y., 665;

Smith v. Alvord, 63 Barb., 415;

Stewart v. Bramhall, 74 N. Y., 85;

Union Note Bk. v. Wheeler, 60 N. Y., 612.

In the absence of any adjudication on the matter by our Supreme Court we are inclined to follow these decisions.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

FRED C. ROUNDS and ALBERT H. WETTEN, doing business as ROUNDS & WETTEN,
Appellants,

vs.

VICTORIA HOTEL COMPANY, a corporation,
Appellee.

184 I.A. 500

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

This is a suit brought in the Municipal Court to recover commissions alleged to be due to the firm of Rounds & Wetten, real estate brokers, hereinafter called plaintiffs, for negotiating a lease to one James C. Soenksen for the Victoria Hotel Company, hereinafter called defendant. The case was tried by the court without a jury, who found the issues for the defendant and rendered judgment against the plaintiffs.

After careful consideration of the evidencewe have concluded that the judgment must be reversed and the cause remanded for another trial. We think it is manifest that the court arrived at its conclusion either through a misapprehension of the weight of the evidence adduced, or of the law applicable to the facts. As there must be another trial, we will refer to the evidence briefly.

In February, 1909, the plaintiffs learned that the defendant had space advertised for rent, and having some parties who wished such space, got into communication with the office of defendant. A telephone conversation was had between Mr. Buffer, the president of the defendant company, and a Mr. Stockwell, one

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of the salesmen for the plaintiffs. Mr. Puffer informed Stockwell as to space and terms, and was told by Stockwell that plaintiffs had a party whom they thought they might be able to interest. Shortly afterwards Stockwell visited defendant's property with a prospective tenant, and was shown the same by a Mr. Huntley, one of the officers of the defendant company, who told Stockwell that as Mr. Puffer was sick, he (Huntley) would negotiate the matter. Stockwell introduced himself by presenting to Huntley one of the business cards of the plaintiffs, at the same time informing Huntley that he was connected with this real estate firm and that the party with him was a prospective tenant for the space that the defendant had for rent. They were shown through the space, and there was considerable talk about terms and price. During the discussion Huntley asked Stockwell as to what would be the amount of his commission, to which Stockwell replied that they would charge the regular Real Estate Board rates, informing him as to what they were, whereupon Huntley replied that the defendant company expected to pay a commission and that the amount was all right. The next day Stockwell submitted a proposition, and other conversations were had with reference to the lease.

About this time a Mr. Johnson, a member of plaintiff's firm, visited the premises with one James G. Soenksen, who was an old client of plaintiff's firm, having negotiated a number of leases for him. He seems to have been the particular client of Mr. Johnson, with whom he had a social and business acquaintance for several years prior to this. Johnson and Soenksen were shown through the premises by the secretary of the defendant company. Johnson called the next day and had a conversation with Mr. Puffer, to whom he gave one of plaintiff's business cards, at the

same time informing him that he had already visited the premises with Soenksen. Puffer named a figure at which they were willing to lease the premises, which Soenksen thought was too much. Puffer informed Johnson that he was going to leave the city that evening; that the defendant company had a deal on which they expected to close that afternoon, but in the event this was not consummated they would see Johnson and take up the matter of leasing to Soenksen when he (Puffer) returned. Johnson then informed Puffer that he could continue with Soenksen and await Puffer's return.

Shortly after that Soenksen received an injury which disabled him to the extent that he was unable to attend to any business for about four weeks and was confined to his room. During this time Johnson had frequent conversations with him and discussed the matter of the leasing of the premises of the defendant. After Puffer returned to the city, and while Soenksen was still confined to his room, Soenksen was called over the telephone by a Mr. McManus, who was unknown to Soenksen. McManus stated that he had a proposition which he thought would interest him, and that it was with reference to the space for rent of the defendant company. Soenksen told him that he was already informed as to that matter but was not satisfied with the price. McManus then stated that he was the exclusive agent and had a price which would interest him, and made an appointment to meet him at the defendant's office that afternoon. The appointment was kept and Soenksen met McManus at the defendant's building, and after some negotiations a lease was consummated, Mr. Huntley being present and participating in the matter, and Mr. McManus at that time stating that he was the exclusive agent of the premises. Soenksen informed McManus in the presence of Huntley that he had previously been shown the premises by Mr. Johnson

of the plaintiff's firm.

Soenksen testified that from the time the premises were first shown him by Mr. Johnson to the time the lease was signed he had not abandoned the intention of leasing the premises; that the location was satisfactory and what he wanted; that the only matter in doubt was the question of price, and that he always expected as soon as he recovered from his injury to make a satisfactory arrangement with Mr. Johnson as to the rental price.

While there may be some controversy upon some parts of the foregoing statement of fact, yet its substantial correctness is supported by the preponderance of the evidence.

It is well established by many cases that if a real estate broker produces a customer and carries through the negotiations to their consummation he is entitled to his commission, and also that where he first produces a customer and continues the negotiations he will be considered as the procuring cause of the final consummation with such customer, although the negotiations may be completed by the principal or through another party. Henry v. Stewart, 185 Ill. 448; Rigdon v. Wore, 226 Ill. 382; Hafner v. Herron, 165 Ill. 242. Applying this rule to the facts herein, we are unable to agree with the conclusion of the trial court in his holding that the plaintiffs, through Johnson, were not the procuring cause of the leasing of defendant's premises to Soenksen.

Upon the trial plaintiffs sought to introduce conversations between Soenksen and Johnson which took place at the time Soenksen was confined to his room. It is claimed that the purpose of this was to show that it was through the efforts of Johnson that Soenksen was continuing in his disposition towards leasing the premises, and also as tending to prove that Soenksen had not abandoned this idea. The court, however, refused to al-

low the introduction of this. Neither counsel has favored us with any citations of decisions touching upon the admissibility of such evidence, but it would seem that if, as the court held, it was proper for Soenksen to testify that he had not abandoned the idea, it would be proper to show what was said by Johnson and him concerning the proposed leasing, both as tending to corroborate that statement and also that the court might determine therefrom whether or not the plaintiffs were the procuring cause.

We are of opinion it would be in accord with justice that there should be a new trial, and therefore, for the reasons above set forth, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

388 - 18433

184 I.A. 505

PEOPLE OF THE STATE OF ILLINOIS,
for the use of HENRY J. SCHAEFER,
Appellee,

vs.

GEORGE WIRTZ et al.
On appeal of
JOSEPH THOME AND JOHN DOORNEK,
Appellants.

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against appellants in a suit on a guardian's bond filed in the Probate Court of Cook County.

In 1907 George Wirtz was appointed guardian in the Probate Court of Cook County for Henry J. Schaefer, a minor, and filed his bond for the faithful performance of his duties, with the appellants, Joseph Thome and John Doornek, as sureties. Wirtz, as guardian, subsequently proceeded to sell an undivided one-fourth interest in certain property located in Chicago, and received the sum of $3,333 as the share belonging to his ward. In 1910 Schaefer attained his majority, and in October, 1911, Wirtz, as guardian, filed his final account in the Probate Court, which was approved. Said account showed a balance in his hands as guardian, belonging to the said Henry J. Schaefer, of the sum of $1,900. Upon his failure to turn over the said money to his ward this suit was started against him and his sureties. The defendants having been duly served with summons, were subsequently defaulted for failure to enter an appearance, and judgment was entered against them for $12,000 in debt and $1,900 in damages, to be satisfied upon the payment of the damages with costs and interest. From this judgment the appellants, Joseph Thome and John Doornek, have appealed.

PEOPLE OF THE STATE OF ILLINOIS,
for the use of HENRY T. CONAKEN,

GEORGE AIKEN et al.
On appeal of
JOSEPH THOMS AND JOHN MCCOMAN,
Appellants.

of Cook.

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against appellants in a suit on a guardian's bond filed in the Probate Court of Cook County.

In 1907 George Aiken was appointed guardian of the Probate Court of Cook County for Henry T. Conaken, a minor, and filed his bond for the faithful performance of his duties, with the appellants, Joseph Thoms and John Mccoman, as sureties. Aiken, as guardian, subsequently proceeded to sell an undivided one-fourth interest in certain property located in Chicago, and received the sum of $6,333 as the share belonging to his ward. In 1910 Conaken attained his majority, and in October, 1911, Aiken, as guardian, filed his final account in the Probate Court, which was approved. Said account showed a balance in his hands as guardian, belonging to the said Henry T. Conaken, of the sum of $1,800. When his failure to turn over the said money to his ward this suit was started against him and his sureties. The defendants having been duly served with summons, were subsequently defaulted for failure to enter an appearance, and judgment was entered against them for $12,000 in debt and $1,000 in damages, to be satisfied upon the payment of the damages with costs and interest. From this judgment the appellants, Joseph Thoms and John Mccoman have appealed.

Two points are presented as grounds for reversal. The first is the claim that the suit is not brought in the name of the people, as is required by section 11, chapter 64, Illinois Statutes on Guardian and Ward. This section is as follows: "Bonds may be put in suit in the name of the people of the State of Illinois, to the use of any person entitled to recover on a breach thereof, and damages assessed and proceedings had thereon, as in other cases of penal bonds."

The answer to this claim is that it is evidently based upon a misapprehension of the facts, for an inspection of the record makes it evident that the suit was commended in the name of the people as required by the statute. The plaintiff named in the praecipe is "People of the State of Illinois, for use of Henry J. Schaefer," and the plaintiff is so named in the statement of claim and other papers filed in the case. The only ground for appellants' assertion is that in the summons the defendants are called upon to answer unto "Henry J. Schaefer"; but in view of all the other documents, it cannot be said that this irregularity alone stamps the suit as brought contrary to the provisions of the statute.

The second point urged is that there was no affidavit filed by plaintiff with the statement of claim, and it is said that such an affidavit is required under Rule 16 of the Municipal Court, of which rule the Appellate Court is required to take judicial notice, under section 20 of the Municipal Court act.

It is a sufficient answer to this contention to refer to the recent decision of the Supreme Court in Sixby v. Chicago City Ry. Co., 260 Ill. 478, where it is held that section 20 aforesaid is unconstitutional; and consequently this court cannot take judicial notice of the Municipal Court rule which it is claimed was violated.

These being the only points presented to us, neither of which has merit, the judgment will be affirmed.

AFFIRMED.

308 - 18771

1841 I.A. 506

ISADORE B. SIMCO,
Defendant in Error,

vs.

MORRIS M. MANKOWITZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On June 13, 1913, a judgment by confession was entered in the Municipal Court of Chicago on a warrant of attorney authorizing the confession of a judgment in favor of defendant in error and against plaintiff in error.

August 22, 1913, plaintiff in error presented his motion to set aside and vacate the judgment and for leave to defend against the action. This motion was founded upon a petition supported by the affidavit of plaintiff in error. The motion to vacate the judgment and for leave to defend was denied by the court and plaintiff in error brings the judgment or order of court, denying him the right to plead to the merits, before this court for review.

The plaintiff in error, in his petition to the Municipal Court, sets up the ex parte proceedings resulting in the judgment, and that they were had without any knowledge of the plaintiff in error; that at the time of the execution and the delivery of the judgment note to C. E. Huxley and at the time of the pretended transfer thereof to Isadore B. Simco, defendant in error, said Huxley was the agent for defendant in error, and that all the equities and defenses of the maker of the note exist against the defendant in error as the principal

of his agent, and that defendant in error was not at the time he received said note an innocent purchaser thereof for value before maturity, but that he well knew of and was a party to the fraud perpetrated upon the plaintiff in error in the obtaining of the note; that the plaintiff in error had a valid and meritorious defense to the action of the defendant in error upon said note, namely, that the note was obtained by fraud and misrepresentation of the defendant in error and his agent Huxley, to and in that behalf, and was wholly without consideration and void; that the note on which the judgment was entered was given as a part purchase price for a White Steamer automobile owned by defendant in error, which was sold by C. E. Huxley to the plaintiff in error as the agent of defendant in error on April 2, 1913, upon the representation and express warranty that the automobile was in perfect running order and in first-class repair and condition for immediate use; that the representations of the defendant in error, through his agent Huxley, regarding the automobile were false, and that the defendant in error directed them to be made by his agent Huxley, and both the defendant in error and his agent knew them to be false; that the automobile, instead of being in perfect running order and in first-class repair and condition for immediate use, was wholly out of repair, defective, could not be operated and would not run; that the cylinder was cracked and the valves out of adjustment.

The petition further states that at the time of the sale of the automobile to plaintiff in error, the plaintiff in error was not familiar with automobiles and so informed the defendant in error through his agent Huxley, and plaintiff in error wholly relied upon the representations of defendant in error's agent as to the condition of the automobile; that, in addition to delivering to defendant in error's agent the judgment note for $135 sued on, plaintiff in error paid the defendant in error $175

in cash, and relying upon the warranty of defendant in error as aforesaid, that he would make good to the plaintiff in error all that plaintiff in error expended in repairs of the automobile, plaintiff in error expended in repairs on said automobile the sum of $150.06; that all of the repairs were necessary to place the machine in running condition as warranted by the defendant in error, and that no part of said sum of $150.06, paid out by the plaintiff in error, was ever refunded to him by defendant in error or any person for him.

The petition further alleges that the plaintiff in error notified the defendant in error of the breach of warranty in the automobile before the maturity of the note, and that the defendant in error promised that everything would be made satisfactory, but that instead of making his warranty good, the defendant in error, conspiring with his agent, Huxley, caused the note to be endorsed by Huxley to him, and inequitably and unjustly caused the judgment to be confessed thereon.

The facts set up in the petition presented equitable grounds for the relief asked in the petition, and the Municipal Court should have allowed the plaintiff in error to plead to the merits and defend against the action.

Section 21 of the Municipal Court Act gives to that court power and authority, after the lapse of thirty days from the entry of a judgment, to vacate it on petition setting forth facts which would be sufficient to cause the same to be vacated in a court of equity. Plaintiff in error was not guilty of any undue delay in presenting his application to the Municipal Court, and that court, having authority over judgments by confession given under Section 21 above referred to, should have permitted the plaintiff in error to defend against the action.

For the error in refusing to open up the judgment and give plaintiff in error leave to make defense the judgment or order is reversed and the cause remanded.

REVERSED AND REMANDED.

ber Term, 1912. No.

404-18871

184 I.A. 507

CHARLES L. MILLHOUSE, etc.,
Appellee,

vs.

HERMAN H. KROTZ,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

June 19, 1909, Daniel McHenry and Charles L. Millhouse, copartners, recovered a judgment in the Municipal Court of Chicago against Alfred E. Croft for $826.80 and costs. The judgment was rendered upon an indebtedness due from Croft for a balance of the purchase price agreed to be paid by him for certain shares of stock under a written contract.

From the judgment so rendered the defendant Croft prosecuted a writ of error to this court, where the judgment was affirmed on October 5, 1911. McHenry v. Croft, 163 Ill. App. 486.

On June 28, 1909, the appellant executed, as surety, a bond for the stay of execution upon said judgment in the sum of $1000, which bond was filed and approved in the Municipal Court on June 29, 1909. The judgment from which the present appeal is prosecuted was rendered in an action brought against the appellant Krotz, as surety on the bond.

Appellant filed two pleas to the declaration on the bond,- one of accord and satisfaction and the other of payment. In the first plea it is alleged that after the execution of the bond, appellee received certain notes in satisfaction of the judgment. In the second plea it is alleged that after the execution of the bond, the notes were received in payment.

On the trial no evidence was offered to show that the notes of the Mead Manufacturing Company were in fact delivered to appellee at any time after the execution of the bond. It was contended on the trial and is now contended by counsel for appellant that the failure of McHenry and Millhouse to surrender the notes at the time of the trial in the original case constitutes an acceptance of the same in satisfaction or payment of the judgment. This contention, in our opinion, has no basis in the facts of the case now before us, nor has it any basis in law. On the trial below, appellee voluntarily admitted that, prior to the entry of the judgment against Croft, the four notes in question were filed with the referee in bankruptcy proceedings against the John A. Mead Manufacturing Company, and that since the entry of the judgment two dividends, aggregating $42.06, had been paid on the same, which amount appellant consented to have credited on the judgment, and this amount was so credited in computing the sum for which judgment was rendered against appellant.

Appellant in this case, as surety on the stay bond, is estopped to deny that a valid judgment was in force at the time of the execution of the bond. Any defense in the nature of a payment or discharge of the judgment must be based upon facts arising after the execution of the bond. Smith v. Whitaker, 11 Ill. 417; Keithsburg & E. S. R. Co. v. Henry, 90 Ill. 189, Mann v. Pierce, 14 Ill. App. 6.

The law is that a creditor holding collateral security may prosecute an action against the debtor and at the same time proceed to realize upon the security, and is entitled to follow both remedies until the debt is fully satisfied. Ridgely National Bank v. Patton & Hamilton, 109 Ill.479.

We do not think the court erred in refusing to permit appellant to introduce in evidence the transcript of proceedings in the Municipal court and the opinion of the Appellate

Court for the purpose of showing what facts had been adjudicated in the original suit of McHenry v. Croft, supra. That question is wholly irrelevant and immaterial to the present action against the surety on the stay bond. Appellant's liability in this case is established by the terms of the bond executed by him. That bond recites the judgment against Croft for the sum of $626.80. This recital in the bond binds the surety and he cannot be permitted to deny that at the time of the execution of the bond a valid and unsatisfied judgment was in force. Smith v. Lozano, 1 Ill. App. 171.

The evidence offered by appellant and ruled out by the trial court did not tend to support the plea. It appeared, on the contrary, by admission of counsel for appellant that the notes of the Mead Manufacturing Company, from the time of their date, April 30, 1908, were in the hands of McHenry and Millhouse and always remained in their hands. Whatever may have been the legal effect of the retention of possession of the notes after the entry of the judgment, such retention took place before the execution of the stay bond, and appellant is estopped to raise such a defense by the terms of his bond. If appellant were not estopped by the terms of the bond to avail himself of the defense presented, the facts upon which he relies are insufficient both in law and in good morals to relieve him from liability. The retention of the Mead Manufacturing Company notes by the judgment creditor did not constitute an accord and satisfaction or payment of the judgment. The judgment creditor had a clear right to satisfy the debt represented by the judgment, if he could, by getting the Mead Manufacturing Company to pay the notes. The notes were collateral to the original indebtedness and did not merge in the judgment. Nothing occurred after the judgment and after the giving of the bond sued on in this case which would work a payment or satisfaction of the judgment or bond.

The judgment is affirmed. AFFIRMED.

ober Term, 1912. No.

433-18902

184 I.A. 527

GERMAN AMERICAN SAVINGS LOAN & BUILDING ASSOCIATION et al., Appellants,

vs.

JOHN C. TRAINOR et al., Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal by the complainant is from an order fixing the amount of the master's fees in the cause. The record contains over 1600 pages of typewritten testimony and pleadings and exhibits. A portion of the testimony was taken before Masters Cooper and Hummer; another portion was taken before Master Leaming. The cause, with the testimony already taken before the above named masters, was referred to Master Ellis to take additional evidence and report his conclusions of law and fact upon all the testimony taken in the case. The chancellor, after hearing the testimony of several witnesses, masters in chancery and others, fixed the fee of the master at $575, and directed that the sum be divided between the parties, complainant and defendant, equally. Upon consideration of the testimony offered, and examination of the record, we find no reason for reversing the order. We cannot say that the fee, as fixed by the chancellor, is excessive. We do not consider the cross-errors assigned by Master Ellis, as he is not a party to the cause.

The order is affirmed.

AFFIRMED.

1883/
364 - 18831

DAVID K. JEFFRIS et al., co-partners as CHICAGO CAR LUMBER COMPANY,
Appellants,

vs.

AYER & LORD TIE COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only issue of fact in this case raised by the pleadings was whether the defendant, appellee, took and used certain ties belonging to plaintiffs, the appellants. At the close of plaintiffs' case, the court, on motion of defendant, directed the jury to find a verdict for defendant. The errors assigned relate to the giving of such direction and to the rulings on evidence.

It is urged that the motion for the directed verdict should have been in writing. We are cited to the rule of practice stated in Landt v. McCullough, 218 Ill. 610, that a demurrer to evidence must be in writing. In Bartelott v. International Bank, 119 id. 259, it was said that while a motion to direct a verdict is in the nature of a demurrer to evidence, the same technical particularity is not required in the former as the latter, and that it is usually informal and most frequently made by simply presenting to the court an instruction to be given or refused. Referring to this case, in Swift & Company v. Fue, 167 id. 443, the court says the better practice is that such instruction should be in writing. But it does not appear that a motion to direct a verdict need be in writing even in courts

governed by the practice acts. Much less is it required in the Municipal Court where the practice of oral instructions and in some cases oral pleadings obtains.

It is next contended that the evidence made a *prima facie* case for plaintiffs and that it was, therefore, error for the court to direct a verdict for defendant.

It appears from the evidence that both parties had ties in separate piles on the north bank of the Ohio river at Brookport, Illinois, alongside a switch track of the Illinois Central railroad. The ties were distinguished by private marks. On plaintiffs' was a daub of brown paint. Both parties were accustomed to unload ties at this point from barges and load them on railroad cars for shipment. Sometime between March, 1909, and April, 1910, about 8000 of plaintiffs' ties at this place, practically all they had, disappeared. Both shipped ties from Brookport via the Illinois Central railroad, and way-bills of shipments during that period were introduced in evidence, without proof, as claimed by appellee, that they showed all shipments of ties during that time.

The proof relied upon to connect defendant with the removal of said ties was largely circumstantial. The way-bills referred to tended to show that during that time plaintiffs did not make, and defendant and others did make, shipments from Brookport, and only the shipments of defendant exceeded in quantity the number of plaintiffs' ties.

We do not deem it necessary to consider the cross errors assigned as to the admissibility of said way-bills. Assuming they were admissible, yet we find nothing therein or connected therewith inconsistent with defendant's ownership of the ties it shipped, or anything pointing with any degree of certainty to plaintiffs' ownership thereof. The record does not show who loaded the ties referred to in the way-bills, or where they were loaded.

The nearest to direct evidence on the subject consisted of testimony given by two persons to the effect that while passing said switch in the summer of 1903, they saw a gang of men loading cars with ties bearing a brown paint mark, and saw there one Freeland Hanson, who was defendant's superintendent or yard foreman at that place for several years, including the year in question. One, when asked what Hanson was doing, said he was "sitting around there on a tie pile," but said he did not know who was conducting the loading. Neither of them testified to anything from which it could reasonably be inferred that Hanson was superintending the loading of said ties, or that he was there in the capacity of defendant's agent for any purpose, or that the men were employed by defendant, or that the ties were taken by defendant.

The burden was on plaintiffs to prove the allegation that defendant took the ties. It was not enough to show an opportunity to take them, and that one of defendant's agents was present when they were loaded. Evidence that merely raises a suspicion is insufficient. A careful review of the evidence compels the conclusion that it does not fairly tend to show that defendant took the ties in question, and that the jury could not find for plaintiffs therefrom without "acting unreasonably in the eye of the law." (Libby, McNeill & Libby v. Cook, 225 Ill. 206.) Hence a directed verdict was warranted.

Plaintiffs sought to prove a statement made by said Hanson some two years after the event amounting to an admission that he took the ties. The court properly ruled it was inadmissible, on the ground that it was not a part of the res gestae. (Lowden v. Wilson, 233 Ill. 340). We are not impressed by the contention that this rule should not be enforced against a corporation because it can speak only through agents.

It is also contended that there was error in par-

mitting one of plaintiffs' witnesses on cross-examination to testify that he had reported to plaintiffs in writing, while in their employ, that he understood negroes were carrying away their ties for fuel. We need not consider its competency, for it may well have been excluded in acting on the motion to direct a verdict because taking alone all the evidence favorable to plaintiffs, the court properly held that it was insufficient to warrant the submission of the case to the jury.

The judgment will be affirmed.

AFFIRMED.

184 I.A. 584

408 - 18875

EMMA HUBBARD, Appellee,

vs.

C. GORDON MARTIN, Incorporated, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for injuries resulting, as claimed, from negligent performance of dental work by appellant, the defendant in the case.

The contention that appellant, being a corporation, could not engage in the practice of dentistry is untenable. The act regulating the practice of dentistry contains provisions contemplating that companies, corporate and unincorporated, may engage in such practice. (Chap. 91, Par. 44-h, Hurd's R. S.); and the proof is uncontroverted that defendant undertook to comply with them, through persons employed for that purpose as contemplated by the act, and engaged in the practice.

Refusal to submit to the jury certain interrogatories requested by defendant, is assigned as error. One asked whether the defendant was engaged in the practice of dentistry, another whether plaintiff employed defendant as a dentist to repair her teeth. Neither fact being controverted, the refusal to submit such interrogatories, if error, was harmless, (People v. Commercial Ins. Co., 247 Ill. 92.)

Another interrogatory asked whether any of plaintiff's teeth were lost and another whether any were injured and ruined as a result of the conduct of defendant. As some of the

counts of the declaration alleged and the evidence tended to show other results of the alleged negligence, namely, unnecessary anguish and distress, and shock and injury to the nervous system, neither of said interrogatories, nor both together, called for all the ultimate and controlling facts.

Subject to the same defect was another interrogatory whether plaintiff afforded defendant a reasonable opportunity to cure the alleged soreness and pain. The evidence tended to show not only the causing of unnecessary soreness and pain by unskillful dentistry, but ruination of the teeth, especially for permanent bridge work.

Another interrogatory was whether boring holes into the roots of certain teeth for the purpose of fixing pegs therein for fastening and attaching a bridge was improper dentistry. The claim was not that such method was improper but that the boring through the teeth into the bony tissue of the jaw bone was negligence.

Two interrogatories were submitted that did require a finding of ultimate facts on the issues formed, and there was no error, for the reasons stated, in refusing to submit the other interrogatories. (Chicago & Northwestern Ry. Co. v. Dunleavy, 129 Ill. 132; Chicago City Ry. Co. v. Olis, 192 id. 514.)

It is contended also that the verdict was manifestly against the weight of the evidence. We do not deem it necessary to discuss the evidence at length. It tended to show that one of defendant's employes negligently bored through the roots of four of plaintiff's teeth into the alveolar process or bony tissues of the jaw, thereby causing a painful condition that required long treatment and rendered improbable the placing of a permanent dental bridge. We think the evidence justified the verdict.

It is claimed that the court erred in not striking out testimony given by plaintiff of pain and suffering both while and after the work was performed, as pain might naturally accompany dental work of such character. It was not error as other testimoney tended to show that immediate intense pain and conditions causing additional and unnecessary pain would result from negligence of such character.

Preliminary to giving expert testimony, another dentist testified that he examined plaintiff's teeth the following year and found the roots of the four teeth in question had been drilled through to the end of the bony and soft tissue. It is claimed that inasmuch as plaintiff, in the meantime, had been under the treatment of another dentist, who had probed into the roots, such testimony was improperly received without showing that nobody else had bored into such tissues subsequent to treatment by defendant. Whether or not the conditions complained of were caused or aggravated by anything done by either of the two dentists who testified, was a matter for the consideration of the jury upon which opportunity for cross-examination was afforded.

The secretary of the State Board of Dental Examiners, who had the custody of the record of licenses issued to dentists, testified that he had examined the same and found no record of a license to one J. P. Clark, the name of the employe of defendant who operated on plaintiff. This was competent evidence, and if deemed incompetent because, as it afterwards appeared, no examination was made to determine whether any license had been issued to a dentist by the name of Clark with the initial "J" only, then to preserve the point for review a motion should have been made to strike it out.

We find no reversible error in the record.

AFFIRMED.

tober Term, 1912. No.

424 - 18861

184 I.A. 537

EMERY STANFORD HALL et al., etc., Appellants,

vs.

GEORGE BEIDLER et al., Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants sued appellees for commissions alleged to be due them as architects under a certain contract entered into between them. Appellees denied joint liability thereunder. The court directed a verdict for them. The contract relates to plans, etc., for the construction of a theatre building, and is embodied in certain letters between the parties and a stipulation. In a letter dated November 9, 1907, appellees proposed to appellants as the basis of compensation for their services that they should be allowed 1% of the entire cost of the structure, estimated at $80,000, for preliminary studies, 1½% for general drawings and specifications, 1% for details, appellees to have the benefit of any of such work done in case they exercised the right to discontinue appellants' services, and 1½% for the general supervision of the work.

Before a contract for the structure was let, appellants' services were discontinued and the partnership between appellees was dissolved. Subsequently Beidler alone proceeded with the erection of the structure at a cost of about $130,000, on plans and specifications made by another architect, similar in many details to those furnished by appellants. Appellants were paid 3½% on $80,000, the estimated cost of the building,

and claimed 3½% on its actual cost. After setting forth the basis of compensation in substance as aforesaid, the letter referred to proceeds to say:

> "We are starting out on the theory that this improvement is to be kept within the cost of $80,000.00 and we would use this as a basis in case of concluding to discontinue your services, but in case we continue with your firm to the completion of the entire proposed improvement, we are to pay the regular 5% upon such full legitimate cost."

In reply under date of November 12th, appellants say:

> "We beg to state further that our understanding of your letter of the 9th inst. is that the proposed $80,000. cost is the approximate which is to be used for estimating the amount of our commission, up to such time as you shall contract for the erection of a building, either under our supervision or that of some one else, in which case the contract price entered into by you, or the cost to you of such building, including all stationary fixtures, furniture and decorations, will be the principal on which our commission shall be computed."

On November 18th, a "modification of the contract executed November 9th," signed by all the parties, provides as follows:

> "The question of settlement on the $80,000.00 basis shall not prevail after the contracts for structure have been let, but the aggregate cost in accordance with contracts let shall be the basis of settlement in case of discontinuing services of Hall & Baker."

The contract to build was not let by nor for the partnership. It was not a joint undertaking between appellees such as was contemplated by the contract. It would be unreasonable to hold that after the dissolution of the partnership one of the partners could go ahead and let a contract at any price and render the outgoing partner liable for commissions based upon such arrangement unless the contract expressly so provided. The language of appellants' letter, in the words "up to such time as you shall contract * * * in which case the contract price entered into by you," contemplates that appellees should enter jointly into a contract for the erection of the

building.

The construction of the contract sued on was a question of law for the court, and it properly instructed a verdict for appellees on the theory that it imposed no joint liability on them to pay commissions on the basis of the actual cost of the structure in view of the fact that the contract for the structure was not a joint undertaking. No authorities in support of this proposition need be cited.

The judgment is affirmed.

AFFIRMED.

372 - 18839

JOSEPH WAJER, Appellee,

vs.

UNITED STATES BREWING CO., a corporation, Appellant.

Appeal from Circuit Court, Cook County.

184 I.A. 545

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Appellee as plaintiff recovered a judgment against appellant as defendant for damages on account of personal injuries said to have been received through the negligence of the defendant. Plaintiff was a fireman in defendant's boiler room, in which there were five boilers, three of which were in use at the time of the accident. Underneath each boiler there was an ashpit. The one in which plaintiff fell is described by him as being reached through an opening in the floor about six feet square. Upon this opening there rested usually a wooden cover, which when in place formed part of the floor. This cover was taken off when the cinders and ashes were being thrown from the pit.

Plaintiff testified that on the morning of the accident one Buesing, his helper, was working in the ashpit. The cover was removed in order that the ashes and cinders might be thrown out. He further testified that he was on his way to boiler No. 5, and that the room was filled with steam so dense that he was unable to see. The witnesses for defendant, on the other hand, say that the steam was not so thick but that the floor could be seen. Plaintiff testified that he did not know at the time he was there that the place was open. He had charge of the boiler room and sometimes assisted his helper in removing the cinders and ashes. He further said: "We always had this hole covered because people had to walk through there. It had to be covered. It was a wooden

cover. No hinges on it at all. When the cover was on it formed a part of the floor. It was a sort of a trapdoor; you could pick the cover off and put it to one side when you wanted to use the ash-pit."

The right to recover is predicated first upon the allegation that the defendant furnished plaintiff an unsafe place in which to work, in that it negligently maintained its boilers and boiler room so that steam exhausted into the room, and allowed the glass in the windows to become broken, so that cold air coming in contact with the steam caused it to condense and remain suspended in the room, by which it became difficult to observe objects in the room; and, second, that there was a violation of the provisions of the act to provide for the health, comfort, etc., of employes, which act became in force January 1, 1910, and is now a part of chapter 48 of the Revised Statutes.

Section 4 of the statute is as follows:

> "All hoistways, hatchways, elevator wells and wheel holes in factories, mercantile establishments, mills or workshops shall be securely fenced, enclosed or otherwise safely protected and due diligence shall be used to keep all such means of protection closed, except when it is necessary to have the same open, in order that the said hatchways, elevators or hoisting apparatus may be used."

We do not regard other portions of the act applicable to the situation.

The place into which plaintiff fell comes with the definition of "hatchway." It is to be noted that this section provides in substance that such a hatchway shall be fenced, enclosed or otherwise protected, and that due diligence shall be used to keep such means of protection closed <u>except when the hatchway necessarily must be open in order that it may be used.</u> It is clear from the testimony of the plaintiff that the cover of the hatchway effectively protected it when in place, and that it ordinarily was in place. It apparently was part of his duties, as he was in charge of the boiler room, to see that it was in

place whenever the hatchway was not being used. It was also his duty for his own protection to ascertain that it was down before he attempted to cross the hatchway.

It is argued by the plaintiff that in addition to having the cover placed when the hatchway was not in use, the law imposed upon the defendant the duty of putting a fence or some other protection about the opening while the hatchway was in use. In our opinion this provision may not be read into the statute. The statute is specific in all its provisions, and a requirement such as is suggested by the plaintiff is absent.

It is argued by the plaintiff that it was the duty of the defendant to plead specially the exception mentioned in section 4. We do not so understand the practice. The case cited by plaintiff as to the necessity of pleading the statute of another state is not in point. The court must of course take judicial notice of a statute of this state and all that is therein contained.

A great deal of testimony was admitted, we think erroneously, with reference to the breaking of a "T". This evidently was allowed through a misconception of what, if anything, might properly be introduced under the first count of the declaration, which charged that the defendant negligently allowed steam to escape in the room and negligently allowed "divers of the lights of glass in the windows of said boiler room to become and remain broken so that the cold air coming into contact with the steam caused the same to rapidly condense," etc. No mention is made in the declaration of a broken "T" and the mere escape of steam did not render the boiler room an unsafe place, nor did the breaking of a "T". Keefe v. Armour & Co., 258 Ill. 28.

Basing our conclusion entirely upon the testimony of plaintiff, we are of the opinion that the statute referred to was not violated by the defendant, and that the well known principles as to assumption of risk and contributory negligence on

the part of the plaintiff required that the motion of the defendant to direct a verdict in its favor be granted. Chicago & E. I. R. R. Co. v. Heerey, 203 Ill. 493; Browne v. Siegel, Cooper & Co., 191 Ill. 326.

We agree with plaintiff that the doctrine of assumption of risk is not applicable where there has been a violation of a statute (Streeter v. Western Wheeled Scraper Co., 254 Ill. 244), but as heretofore stated there was not, in our opinion, a violation of a statute.

The judgment will be reversed.

REVERSED.

415 - 18882

184 I.A. 546

EDWARD MERTZEN,
Appellee,

vs.

HERMAN H. HETTLER LUMBER COMPANY, a corp.,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Judgment in the Superior Court was entered in this case in favor of the appellee as plaintiff and against the appellant as defendant, in an action for damages for personal injuries alleged to have been sustained through the negligence of the defendant by the plaintiff while in its employ.

The accident occurred December 20, 1908, a few days before the plaintiff became 17 years of age. He had been working for the defendant for about ten months prior thereto, his duty being to take lumber away from a planing machine and put it on trucks. About twenty days before the accident he was placed at work "feeding a scraper," a machine used in the manufacture of flooring. It was necessary that dull knives be taken from the machine once or twice each day and sharp ones inserted. This exchange was made by another employe of the defendant, and it was the practice for the plaintiff to put his hand in the hole in the machine, out of which the knife block had been removed, and clean out the shavings in the hole so that the block could be properly replaced. Power was furnished the machine by means of a belt running in the usual way from an overhead shaft to two pulleys, one tight and the other loose, and attached to the machine at the floor.

On the morning of the day of the accident the belt was loose, and the plaintiff noticing this called it to the attention of the person whose duty it was to attend to the matter, and the belt was taken off, shortened and put back on the machine under the direction of this latter person, and the plaintiff was informed that the machine was in proper shape to use. A few hours later a change of knives was made. The plaintiff testified that at a time when the machine was not running, he put his hand in it for the purpose of taking out the shavings. It would appear that then the belt in some way changed from the loose pulley to the tight pulley, and the machinery was thus started. The boy's right hand was caught and badly injured.

It is argued there should be no recovery in this case because of the contributory negligence of the plaintiff; that it was an unforeseen accident; that the verdict was against the manifest weight of the evidence; and that there was no evidence to prove the allegations of the declaration.

The question of contributory negligence was one properly left to the jury, and we find no reason to reverse the judgment on the ground that there was clearly shown contributory negligence on the part of the plaintiff.

In the 7th count of the declaration it was charged that the defendant negligently allowed the driving belt of the scraper to be and remain improperly laced and fitted to the pulleys of the scraper so that it became and was liable to run from the loose to the tight pulley, and that by reason thereof the place where the plaintiff was required to work became and was unsafe, etc.; and in apt terms the effect of the alleged negligence of the defendant in this respect, as causing plaintiff's injury, is set forth.

The evidence shows that the belt had been fixed just prior to the accident and had been represented to be in proper condition for running. The person who gave this assurance to

plaintiff was in the position of vice-principal of the defendant. We think there was sufficient evidence of the negligence charged in the seventh count of the declaration to warrant at least the submission of the case to the jury. Chicago Screw Co. v. Weiss, 203 Ill. 536. After careful perusal of the record we are unable to say that the jury was not justified in the conclusion that the defendant did not, as its duty required, furnish the plaintiff a safe place to work.

Certain instructions given on the part of the plaintiff are said to have been erroneous. Waiving the proposition urged by the plaintiff, that the record does not show affirmatively that these instructions were given, we have carefully examined those which are said to have been given, and are of opinion that, taken in connection with other instructions they were not erroneous. We find no error was committed in the refusal to give two requested by defendant, nor in a change made in a third, which had to do with the alleged assumption of risk by the plaintiff. Seven instructions tendered by the plaintiff and twenty offered by the defendant were given without amendment. We are of the opinion that the instructions as a whole correctly advised the jury as to the rules of law which should govern them in arriving at their verdict.

The judgment will be affirmed.

AFFIRMED.

October Term, 1912. No.

416 - 18283

GRACE V. WIESBACH,
Appellee,

vs.

HERMAN H. HETTLER LUMBER COMPANY,
Appellant.

184 I.A. 547

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

Suit was brought against the appellant and E. S. Ormsbee for damages on account of personal injuries said to have been sustained by the appellee in a collision between a carriage in which appellee was riding and a team said to have been owned or controlled by appellant. There was a trial before the court and a jury, the jury rendering a verdict of not guilty as against Ormsbee, and of guilty against the appellant, damages being fixed at the sum of $1000. From a judgment entered upon the verdict this appeal is prosecuted.

The appellant filed a plea of the general issue and a special plea (not abstracted), reciting that before and at the time of the committing of the supposed grievance the appellant or its servants or agents "were not in the use, possession, ownership and control of a certain wagon, commonly known as a truck wagon, as the plaintiff has above thereof alleged," etc. It is to be noticed that ownership of the horses is not denied, nor the charge in the declaration that the horses and wagon were then in the service of the appellant. This plea did not put in issue the ownership, possession or operation of the instrumentalities which are al-

leged to have caused the injury, in accordance with the rule now thoroughly established in this state. McNulta v. Lockridge, 137 Ill. 270; Chicago U. T. Co. v. Jerka, 227 Ill. 95. We are of the opinion, moreover, that at the close of all the testimony there was evidence sufficient to warrant the jury in finding that the team and driver were under the direction of the appellant, and that Ormsbee was not an independent contractor; that the case is distinguishable from that of Foster v. Wadsworth-Howland Co., 168 Ill. 514, cited by appellant.

The driver of the wagon, called as a witness by the plaintiff, testified that at the time of the accident he was driving "Hettler Lumber Company's wagon" and that he was in the employ of Ormsbee. In his cross-examination by counsel for appellant he was asked the question as to whether he knew to whom the horses belonged, and answered, "to Mr. Ormsbee." He further testified that he "got the lumber at the Hettler Lumber Company," and that he had made two deliveries that day. On being called as a witness by Ormsbee, the same witness testified that he was hauling lumber for the Hettler Lumber Company; * * that nothing was said to him by anyone as to what he should do; * * that he got his directions as to where to take the lumber from Martin, the shipping clerk of appellant; * * that Ormsbee never gave him any directions as to methods of loading or delivery, or anything of that kind.

Ormsbee testified that he was paid a certain amount per day for the use of the team and driver; that he owned but one team, and that the one which was thus employed in hauling lumber for the appellant; that the wagon belonged to the appellant, and that Ormsbee had nothing to do with the direction to the teamster as to what the latter was to do at the yards, etc.

The Appellant offered no evidence in the case, but evidence was taken on behalf of the defendant Ormsbee. At the close of plaintiff's (appellee's) case appellant moved the court

to direct a verdict in its favor. This was denied. The motion was not renewed at the conclusion of the taking of all of the evidence. On the other hand, the appellant submitted other instructions based upon its theory of the case, to the effect that if the jury believed from the evidence (necessarily including that offered by Ormsbee) that the negligence which caused the alleged injury was the negligence of some one other than an employe, agent or representative of the appellant, the verdict should be not guilty.

The present case is in our judgment distinguishable from Condon v. Schoenfeld, 214 Ill. 336, in the fact that these instructions were tendered by appellant. This is asserted by appellee, and, we think, correctly, to constitute a waiver of the motion which was made. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491. We are also of the opinion that there was some evidence, though slight, at the close of appellee's case tending to establish the fact of ownership and control.

We are of the opinion that there was evidence to prove the material allegations of the declaration; that the verdict is not against the manifest weight of the evidence; that the work being done by the team and wagon was not being done by Ormsbee as an independent contractor.

We find no erroneous rulings in the admission of evidence such as should cause a reversal of the judgment.

The judgment will be affirmed.

AFFIRMED.

75 - 18519.

OLIVER J. WRIGHT,
Defendant in Error,

vs.

JOHN L. BOLEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1841.A.569

PRESIDING
MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiff in error (hereinafter called the defendant) seeks to reverse a judgment rendered against him for $858.70 after a jury trial in the Municipal court. The plaintiff's statement of claim as amended was for the value of work and labor performed by the plaintiff as a carpenter and foreman for the defendant for certain periods of time therein stated. The defendant's affidavit of merits states that plaintiff did not work for defendant all of the time stated in the plaintiff's statement of claim, and asserts that settlements were made from time to time and that the plaintiff was paid in full. It appears from the evidence that the plaintiff was employed by the defendant as a carpenter and to superintend the erection of certain houses which defendant was building. There is some slight dispute as to the terms upon which the plaintiff was employed, the plaintiff claiming that the defendant agreed to pay him "better than carpenter's wages", while the defendant testified that he agreed to pay carpenter's wages and also to "remember him (plaintiff) in a substantial way out of the profits". The plaintiff testified that carpenter's wages at the time in question were from 50 to 55 cents an hour, and that the reasonable value of his services was $30 a week. The only real dispute in the evidence arises over the question of payment. We think the evidence is clear that during the first four weeks of

the plaintiff's employment the defendant himself paid the wages of the workmen, not including the plaintiff. The evidence is also clear that during the succeeding 26 weeks, and also during a later period of 11 1/2 weeks, the plaintiff submitted to the defendant at the end of each week a statement of the amount due to the workmen and for materials, including, in most cases, an item of $10 weekly on account of his own services; that upon receiving these statements, the defendant drew his check to the order of the plaintiff for an amount which was sometimes a little more and sometimes a little less than the amount of the statement; that plaintiff deposited these checks to his own account and paid the amounts shown on the statements out of funds so received from the defendant. Upon the trial, the plaintiff offered in evidence copies of all these statements. They show that during the periods above stated (excluding the first four weeks, during which the defendant himself paid the bills) the plaintiff paid out, to others than himself, for wages, labor and materials, the sum of $4310.55. His entries of credits on the same statements show that he received from the defendant, during the same periods, the sum of $4300, leaving a balance to defendant's credit of $141.45. The plaintiff admitted that in addition to the credits shown on his statements, he had received $75 in cash and $100.00 in materials taken by him at an agreed value. Defendant also produced and offered in evidence six checks, aggregating $314.74, which the plaintiff admitted he received but which were not shown as credits on his statements. Defendant was entitled, under the evidence, to have credit for these additional items. These items, added to the balance shown by the statements, make the total credits amount to $637.49. Subtracting this total from the amount shown by the evidence to be the value of the plaintiff's services ($30

a week for 43 1/2 weeks) leaves a balance due to the plaintiff of $367.51. To that extent, we think the verdict of the jury is fully supported by the evidence. As to the excess of $191.19 we think the verdict is contrary to the evidence.

It is urged that the court erred in instructing the jury. For the purpose of making this objection counsel for plaintiff in error has divided the oral charge of the trial court into separate, numbered paragraphs. This method of considering oral instructions cannot be adopted. The instructions must be considered together and not subdivided or separated, one paragraph from the other. In Pecararo v. Malberg, 240 Ill. 95, it was held that an exception to an oral charge must point out specifically the portion of the charge objected to, and that this rule obtains in all cases where oral instructions have been given, "and is necessary to prevent inadvertent errors". At the time the oral charge was pronounced, the only objection raised was that "the court has not instructed the jury as to the basis of recovery upon the defendant's theory of the suit; if he was to have any definite amount, to get fifty-five cents an hour. And also, as to the burden of proof on the basis of payment". As to the first of these objections, we think the charge of the court fairly placed before the jury the issues made by the plaintiff's statement of claim and the defendant's affidavit of merits. As to that portion of the charge referring to the burden of proof as to the defense of payment, we think it is in accord with the authorities in cases where payment is the sole defense. Donnell v. Wilder, 67 Ill. 327. The defendant did not dispute the employment of the plaintiff, nor did he offer any evidence tending to prove that the plaintiff's work was not worth $30 a week. While the defendant's evidence as to the terms upon which the plaintiff was employed is not precisely the same as that of the

plaintiff, the difference is very slight and the legal effect is practically the same, under the facts shown by the evidence.

It is also urged that the court erred in permitting the wife of the plaintiff to testify. The plaintiff testified that his wife, on several occasions, collected money for him from the defendant, and the wife's whole evidence related to a conversation with the defendant concerning the plaintiff's account. We think there was no error in the admission of this testimony.

Upon the whole record, and after a careful study of the evidence, we think no error was committed, prejudicial to the plaintiff in error, except as to the amount of the verdict. That error can be cured by a remittitur. If, therefore, the defendant in error will, within ten days from the date of the filing of this opinion, file herein a remittitur of $101.10, the judgment for the remainder, $107.51, will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

218 - 18677.

184 I.A. 570

WILLIAM C. REGELIN and WILLIAM JENSON, copartners, and doing business as REGELIN-JENSON & CO., Defendants in Error,

vs.

THOMAS CONRAN, Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

PRESIDING

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiffs, who are real estate brokers in Chicago, recovered a judgment against Thomas Conran, the defendant, for $350 commissions earned in securing a purchaser for certain property belonging to the defendant. The evidence shows that plaintiffs found a purchaser named Reilly, with whom the defendant entered into a written contract. By the terms of this contract, defendant agreed to convey his property to Reilly at a stated consideration of $30,000, subject to encumbrances of $17,000, and in consideration thereof, Reilly agreed to convey to the defendant, at a stated consideration of $30,000, subject to an encumbrance of $2500, a tract of land described as follows: "The northeast corner of Kobey street and Montrose boulevard, a lot or parcel of ground 100 by 152 feet (m. or l.) together with all improvements thereon". Before signing this contract, the defendant went upon the property and looked it over. He was told by the plaintiff's salesman that the dimensions of the lot were 100 feet on Kobey street and 152 feet on Montrose boulevard. Reilly testified that he told the salesman and the defendant that these were the dimensions of his property. He also testified that at the time he said this, and at the time he signed the contract, he believed the statement was true; that he "bought it for that and sold it for that," and that he had owned the property since 1923. There was a board fence on

PRESIDING

the north side of the property, an alley on the east, and there were cement sidewalks on the south and west sides of the lot. The defendant testified that after the contract was signed, he measured the lot with a steel tape line and discovered that the frontage on Robey street was only 98 feet instead of 100 feet, as he had been told. He reported his discovery to Reilly and after making an unsuccessful attempt to induce Reilly to make some concession in price on that account, he declined to carry out his part of the contract. Plaintiffs sued him for commissions on the theory that their commissions were earned when the contract was signed. Defendant filed an affidavit of merits, claiming that the plaintiffs falsely and fraudulently represented the property of the purchaser to be of larger dimensions that it was in fact. Upon the trial, however, defendant's counsel abandoned this defense, admitted that there was no proof of fraud or fraudulent representations, and then advanced the claim that the contract was not enforceable because entered into under a mutual mistake as to a material fact. To support this theory, he offered to show, in addition to the facts above stated, that the defendant had computed the value of the Reilly lot at $175 a foot on Robey street, that he had an architect prepare plans for a store and flat building 100 by 150 feet in size, and other similar facts, which, he claimed, had a tendency to prove that defendant had signed the contract under a mistake as to the amount of frontage on Robey street.

Defendant's counsel concedes the rule to be that a real estate broker, employed to secure a purchaser for property, has earned his commissions when he finds a buyer who is accepted by the seller and with whom the seller enters into a valid and enforceable contract, even though the contract be afterward cancelled or abandoned through no fault of the broker. Silsen

v. Mason, 156 Ill. 310; Fox v. Ryan, 260 Ill. 391. But it is urged that where the purchaser and seller are mutually mistaken as to a material fact, the contract is not enforceable. We do not think that principle is applicable to the facts of this case. The rule is well settled that a court of law has no power to correct a mistake and reform a contract. Such a power rests alone in a court of equity. Cunningham v. Trevey, 25 Ill. 62, 64; Eagle Fire Ins. Co. v. Jno. Spry Lumber Co., 139 Ill. App. 609, 611. In the case last cited, suit was brought by the lumber company on an insurance policy which described the property insured as "lumber, lath, shingles * * or other merchandise * * * contained in their yard, or in buildings, sheds, or cars on tracks in said yard, situated on the east side of Ashland Avenue, extending north from the west branch of the south branch of the Chicago River." The policy contained a warranty by the assured that "a clear space of 65 feet shall be maintained between lumber and mill and addition on south." It was contended that any lumber piled within the 65 feet space thus described was not intended to be covered by the policy and that the language used in the policy, apparently covering all the property in the lumber yard, was a mistake; and evidence was introduced upon that theory. As to this contention the court, by Mr. Justice Adams, said: "To discuss this evidence would be a mere waste of time, for the reason that a court of law has no jurisdiction to correct mistakes in written contracts. In a law court the parties will be held bound by the written contract, the words of which will be taken in their ordinary acceptation, and what the words mean will be held to be conclusive of the intention of the parties."

By the terms of the contract offered in evidence, giving to the words thereof their ordinary acceptation, Reilly agreed to convey to defendant "a lot or parcel of ground 100 by 152 feet

(m. or l.)" located at the northeast corner of two named streets. It is conceded that the phrase "m. or l." is an abbreviated form of the words "more or less." The contract also provides that defendant shall furnish an abstract of title "showing good and sufficient title at date of this contract in the respective parties hereto, to the property hereby agreed to be conveyed." Taking these clauses together, the natural meaning of the language employed is that Reilly agreed to convey a lot owned by him at the date of the contract, which was located at the corner mentioned and was approximately of the dimensions stated. "The words 'more or less' * * * as applied to quantity * * * are to be construed as qualifying a representation or statement of an absolute or definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the contract." 1 Beach on Modern Law of Contracts, Sec. 83, p. 108. Therefore, the use of the words "more or less" in this contract cannot be construed as an assurance that the tract contained precisely 100 feet of frontage on Kobey street, but, on the contrary, the use of this phrase shows that the exact number of feet was not certainly and definitely known to either party at the time the contract was entered into, and that both parties were willing, within reasonable limits, to abide by the actual measurements, when ascertained. The claim originally made by defendant that the statement of quantity was fraudulently made, having been abandoned on the trial, and there being no evidence of any want of good faith, it follows that the contract was enforceable in a court of law according to its terms, and therefore, that the plaintiffs were entitled to their commissions when the contract was signed.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

234 - 18,726.

184 I.A. 575

GREER-WILKINSON LUMBER CO., (a Corporation), Defendant in Error, vs. GEORGE A. NEEVES, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment entered in the Municipal Court in favor of the defendant in error for $586.15, being the amount, with interest, of a promissory note given by Neeves to the Greer-Wilkinson Lumber Company in February, 1911. The note upon which suit was brought is a note given in renewal of another note for the same amount, dated in April, 1910. The circumstances under which the original note was given form the basis of the defense to the note. It appears that in 1909 the defendant Neeves employed one Plaskett, a contractor, to build a frame house, to cost $1200, upon a lot owned by Neeves in Pembroke, Illinois. Plaskett resided in Morocco, Indiana, and purchased all the material for the house, except the paint, from the plaintiff, Greer-Wilkinson Lumber Co. A house was constructed by Plaskett, but the defendant Neeves refused to accept the house as a compliance with the contract, on the ground that it did not conform to the specifications. When Plaskett demanded pay for the house Neeves refused to pay for it and offered Plaskett the privilege of removing it. In April, 1910, a man, who said he represented the plaintiff, presented a bill to Neeves for lumber purchased by Plaskett which had been put into the house. Neeves declined to pay, upon the ground that the debt was not his but was Plaskett's. The representative

of the plaintiff claimed that Reeves was liable under the Indiana Lien Law. Reeves told him that the Illinois Lien Law was different from the Indiana law and that he, Reeves, was not liable. The man went away and returned several days later with a lawyer. They admitted the plaintiff had no claim under the Illinois Lien Law, but they insisted that defendant ought to pay for the lumber because it went into his house and he had the benefit of it. Reeves testified: "We had considerable conversation on that subject. I told him the house was not in accordance with the contract, that it was of no service to me, and was not what I wanted; that I had told Plaskett to take the house off, and the contractor and sub-contractor could divide the business any way they saw fit." Reeves further testified, however, that he finally agreed to give a note to the plaintiff for $542.34, which was over $200 less than was claimed by the plaintiff, and that he paid interest on this note until the renewal note was given.

It is insisted that there was no valid consideration for the original note, and hence there was no consideration for the note sued on. It is a well-settled principle that "the compromise of a doubtful right, though it afterwards turns out the right is on the other side, where there is neither actual nor constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise." Honeyman v. Jarvis, 29 Ill. 310, 313. To the same effect are Adams v. Crown Coal & Tow Co., 199 Ill. 445, 450; Hulse v. Hulse, 155 Ill. App. 343, 348. There is no pretense in this case of any actual or constructive fraud; and so far as the evidence shows, the parties acted in good faith, with full knowledge of the facts. At the time the original note was given, the plaintiff was asserting a claim against the defendant. The defendant denied the valid-

ity of the claim, but notwithstanding that fact, he settled and compromised the plaintiff's claim against him by giving his note for part of the amount claimed to be due from him. Whether the plaintiff could have recovered the amount of its claim, in an action brought thereon against the defendant, is immaterial, if the claim was honestly made. McKinley v. Watkins, 13 Ill. 140. In the quaint language of an Indiana case, quoted in Honeyman v. Jarvis, supra, the defendant "constituted himself a judge in his own cause and decided against himself. We are of opinion that the weight of authority is, that he cannot now be heard to reverse his own judgment."

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

October Term, 1912. No.

346 - 18813.

In the matter of the petition of JOHN JACOB MEYER, arrested at the suit of BERTHA KURZ,
On appeal of JOHN JACOB MEYER, Appellant,

vs.

BERTHA KURZ, Appellee.

) 184 I.A. 596
) APPEAL FROM
) COUNTY COURT
) COOK COUNTY.

MR. PRESIDING JUSTICE WITON DELIVERED THE OPINION OF THE COURT.

A judgment was rendered in an action for slander, in the Circuit Court of Cook County, in favor of Bertha Kurz against John Jacob Meyer. The declaration in that case consisted of one count, and charged that Meyer, "contriving and maliciously intending to injure the plaintiff and bring her into public scandal and disgrace," falsely and maliciously, and the presence and hearing of divers persons, spoke the following words of and concerning the plaintiff: "This woman has stolen the watch and chain belonging to my son." Meyer defaulted, and a general verdict, finding him guilty and assessing the plaintiff's damages at $500, was returned. Meyer was arrested upon a capias ad satisfaciendum, issued upon the judgment, and filed his petition in the County Court for a discharge under the Insolvent Debtors' Act. In that court, he offered to prove, by evidence dehors the record, that the words uttered were not uttered maliciously; but the court declined to hear any such evidence, upon the ground that the question whether malice was the gist of the action must be determined solely from the record in the slander suit. Thereupon, after examination of such record, the court held that malice was the gist of the action for slander and denied the petition for a discharge. The question

involved in this appeal is whether that ruling was correct under the circumstances above related.

In Jernberg v. Mix, 199 Ill. 284, the court, in stating the principles governing such cases, said (p.287): "The former judgment was conclusive as to every matter properly and necessarily at issue in the action, and if it appeared from the pleadings that malice was the gist of the entire action, the doctrine of res judicata would apply. In such a case, an inspection of the record would conclusively establish that the question of malice was settled in the former suit, and having been once determined the judgment would be an effectual bar to any further dispute of that question between the parties." (Italics ours.)

In the early case of McKee v. Ingalls, 4 Scam. 30, it is said of an action for slander (p. 33): "The speaking of actionable words is evidence of malice. Malice is the gist of this action."

In Gilmer v. Rubank, 13 Ill. 271, which was also an action for slander, the words charged to have been spoken were that the plaintiff "had stolen a steer" belonging to the defendant, and the general issue, only, was pleaded. The court said (p. 274): "Malice is the gist of the action of slander. But the term 'malice' has a two-fold signification. There is malice in law, as well as malice in fact. In the former and legal sense, it signifies a wrongful act, intentionally done, without any justification or excuse. In the latter and popular sense, it means ill-will towards a particular person; in other words, an actual intention to injure or defame him." Applying that distinction to the case then before it, the court concluded (p. 276): "In this case, the words were actionable in themselves, and they were not published under circumstances that afforded any excuse or justification to the defendant. He was therefore

liable for the consequences, unless the plaintiff had committed the crime of larceny. And he did not by his pleadings offer to prove the proof of the charge. The existence of malice in fact was not necessary to maintain the action. The law raised the presumption of malice, and that presumption was conclusive." (Italics ours.)

From these decisions, we deduce the rule that in actions for slander if the words charged to have been falsely uttered are not actionable per se, it is necessary to aver and prove malice in fact, but if they are per se actionable, then the law conclusively implies malice from the use of such words, if false and uttered without legal justification or excuse; and that in either case, malice is an essential element of the cause of action, or in other words, is the gist of the action. In this case, the words charged to have been used were actionable per se. Gilmer v. Kubank, supra; Miller v. Johnson, 79 Ill. 58; Stuner v. Fitchner, 134 Ill. 230. That they were spoken by Meyer concerning Martha Kurz and that they were false, were admitted by the default; and that they were maliciously uttered is conclusively presumed from the facts thus admitted and from the absence of any plea of justification or excuse. Hence it appears from an inspection of the record in the Circuit Court case, that the verdict was responsive to the issues presented and that the issue of malice was properly and necessarily presented and determined adversely to Meyer in that case. It follows that the trial court correctly ruled that extrinsic evidence upon those issues was inadmissible in the County Court upon the petition of Meyer for a discharge, and its judgment will therefore be affirmed.

AFFIRMED.

114 - 18565.

HATTIE ISABELLA McLAUGHLIN,
Defendant in Error,

vs.

NATIONAL PROTECTIVE LEGION,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

184 I.A. 597

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Defendant in error, plaintiff below, commenced an action of the fourth class in the Municipal Court of Chicago to recover of plaintiff in error, defendant below, the sum of $500 claimed to be due her on a policy of insurance in which she was named as beneficiary, and which had been issued by defendant under date of March 1, 1908, on the life of Patrick Mc Laughlin, her husband, who died on January 9, 1911. One of the provisions of the policy, or certificate of insurance, was that any member who failed to make his monthly payments in full on or before the last day of the month in which a levy was made, would "stand suspended from all the rights and benefits of the Mortuary Fund without further notice." The defense was that the insured had failed to make the November and December, 1910, payments on the policy. The case was tried before a jury who returned a verdict for plaintiff for $500, upon which verdict the court entered the judgment which defendant by this writ seeks to reverse.

One month prior to the issuance of the policy in question, to-wit, on February 1, 1908, the defendant had issued a like policy for $1500 on the life of said Patrick McLaughlin. Plaintiff was also named as beneficiary in this policy and she made the monthly payments on both policies, (which amounted to $1.97 on the $1500 policy and 66 cents on the policy in question) in addition to paying the monthly dues of the insured, amounting to

25 cents, to the local lodge. Although it was the duty of the secretary of the local lodge to receive all monthly payments and monthly dues, plaintiff at first made payments to one J. H. Price, an insurance solicitor or organizer in defendant's employ, to whom said secretary sometimes gave blank forms of receipts for the purpose of making collections, and from whom she accepted collections. Plaintiff testified that she made various payments to Price at different times from July, 1908 to March, 1910, taking a receipt for the money paid; that three of these receipts were signed by said secretary, and that 10 receipts, amounting to $30.04, were signed by Price, he telling plaintiff each time that she owed a certain sum on both policies. These ten receipts signed by Price did not specify the proportionate amount due on each policy, and contained some superfluous printed matter. In addition to these 13 receipts plaintiff introduced 3 other receipts signed by said secretary. Inasmuch as said secretary testified that 16 payments by plaintiff had been reported to her by Price, it is a fair inference, we think, that Price turned in all moneys to defendant paid by plaintiff. The defendant offered no evidence to the contrary. Plaintiff further testified that the last payment made by her to Price was made during March, 1910, at which time Price told her that the $1500 policy had been forfeited, and he further told her that all monies paid to him by plaintiff had been turned over to the defendant. After the death of the insured, plaintiff received a letter from the district manager of defendant informing her that the last payment made on said $1500 policy was made "for the month of August, 1909, and he was suspended from any benefit for failure to pay for the month of September on the first day of October, 1909, since which time the policy has been out of benefit."

After March, 1910, plaintiff paid no money to Price or any other collector, but was in the habit of sending to the defendant's local office a money order and a receipt card, which card was returned to her after the payment had been entered thereon. This card showed that payments had been made by her only on the $500 policy in question, covering the months of April, 1910, to October, 1910, inclusive. It is evident from this that plaintiff, after receiving the notice from Price of the forfeiture of said $1500 policy, considered the same as having been forfeited. Plaintiff testified that on January 6, 1911, three days before the death of her husband, she gave her sister $5 with which to make payments on the said policy, and also on her brother's policy, of which plaintiff was also the beneficiary. On the day after said husband's death, and before the defendant had been notified thereof, plaintiff's said sister made a payment at defendant's local office of $2.75 on the policy in question, covering the amount due thereon for all assessments and dues for the months of November and December, 1910, and January, 1911. After proof of death had been made the defendant refused to pay the amount of the policy on the ground that the monthly payments and dues for said months of November and December had not been made in time. During the month of January, 1911, the secretary of the local lodge tendered to plaintiff the said sum of $2.75, which plaintiff refused to accept. Said secretary and an assistant testified that in March, 1911, they again tendered said sum to plaintiff and that plaintiff accepted the money. Plaintiff denied this.

The evidence tends to show that, after the $1500 policy had been in fact forfeited by defendant but before plaintiff had knowledge of such forfeiture, plaintiff paid Price about $18 more than was necessary to make all necessary payments on the $500 policy; that she did this under the belief that she was making

payments on both policies; that after she was notified by Price of the forfeiture of said $1500 policy she acquiesced therein; and that at the time of the death of Patrick McLaughlin, notwithstanding the fact that the assessments on the $500 policy for the months of November and December, 1910, had not been paid by her during said months, she had money to her credit in the hands of defendant considerably in excess of the amount necessary to pay all assessments for said months on said $500 policy.

After careful consideration we have reached the conclusion that, under the somewhat unusual facts as disclosed by this record, the court did not err in entering judgment on the verdict. "Forfeitures are abhorrent to the law." (Coverdale v. Royal Arcanum, 193 Ill. 91, 101; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 169.) And "the burden of showing a failure to pay assessments from which failure a forfeiture is claimed to have arisen is upon the insurer." (Supreme Council v. O'Neill, 108 Ill. App. 47, 50.) We do not think the defendant has sustained this burden.

It is claimed that the court erred in admitting in evidence the said 10 receipts signed by Price, because no reference to the policy sued on appears upon their face. We are of the opinion that they were properly introduced in evidence in connection with plaintiff's testimony explaining them. (Hartford Ins. Co. v. Sherman, 183 Ill. App. 208, 214; Estate of Switzer v. Burtenbach, 120 Ill. App. 26; Ditch v. Vollhardt, 82 Ill. 134, 138.) And the evidence tends to show that Price had at least the apparent, if not the actual, authority to make the collections and issue the receipts, and whether he had that authority was a question of fact for the jury. (Schmoldt v. Langston, 106 Ill. App. 585.)

We think that the verdict is supported by both the law and the evidence, and that substantial justice has been done, and the judgment is therefore affirmed.

AFFIRMED.

October Term, 1912. No.

216 - 19675.

1841.A.617

CHICAGO EMBOSSED MOULDING COMPANY, a Corporation, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
MAX G. J. HOFFMAN, Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, defendant below, seeks by this writ to reverse a judgment for $111.32 rendered against him in the Municipal court of Chicago in favor of defendant in error, plaintiff below, in a fourth class case tried by the court without a jury.

Plaintiff claimed that defendant was indebted to plaintiff in the sum of $115, as rent, for a portion of the second floor of a certain factory building in Chicago for the month of November, 1911, less the sum of $3.68, being a balance due defendant on a separate open account between the parties. Defendant denied that he owed plaintiff anything for rent of said premises, and claimed damages, by way of set-off or recoupment, for failure of plaintiff to furnish power to defendant at certain times while defendant was occupying said premises under a verbal lease of the same "including power".

The material facts are as follows: About two years prior to November 1, 1911, defendant, by verbal lease from plaintiff, "rented the space and power" for $90 a month, occupied the space continuously up to about November 10, 1911, and paid the rent for the same to plaintiff from month to month, including the month of October, 1911. Plaintiff's business was that of manufacturing mouldings, etc., and it

occupied said factory building, less the space leased to defendant, for that purpose, using power for operating machinery. Defendant occupied said space in connection with his business of manufacturing special cabinet work for offices and stores, and he required certain power for running his machinery. On September 15, 1911, defendant served a written notice on plaintiff to the effect that he desired to vacate the premises as plaintiff's tenant and would do so on October 31st. On September 23th, plaintiff wrote defendant accepting said notice and stating that plaintiff had made arrangements for a new tenant November 1st, at which time plaintiff expected defendant to vacate the premises. Plaintiff also stated in said letter that if defendant desired to continue to occupy the premises after November 1st, defendant might do so until May 1st following, at a rental of $110 per month, payable in advance, providing he would notify plaintiff of his intention so to do not later than October 1st, so that plaintiff could cancel the arrangements with its proposed new tenant. Defendant did not notify plaintiff of his intention to occupy the premises after November 1st, but he did occupy the same until about November 10th, when he moved out. On November 20th, plaintiff wrote defendant, enclosing memorandum charging defendant with the sum of $115 for rent of the premises for the month of November, 1911, and giving defendant credit for balance on said open account, and demanding prompt payment of the net balance of $111.38. Defendant did not pay plaintiff any part of this amount, although there were some negotiations had between the parties towards a settlement, and plaintiff finally brought the present action.

The defendant, Hoffman, testified that there were several occasions during his occupancy when he could not get

power to run his machinery, once in March, 1911, for a period of two weeks, when plaintiff's "engine exploded" and plaintiff put in another engine; again, in June, 1911, for a period of eleven days, when "an eccentric ring, or something, a piston ring", broke and a new one had to be procured by plaintiff from St. Louis; and again, on October 23, 1911, for a period of several days, when defendant "was tied up with contracts that had to be out by November 1st", and which put him "in an awful fix". It does not appear that the cessation of power in October, 1911, was the result of other than unavoidable causes. Defendant further testified to certain facts tending to show that he was somewhat damaged in his business because of the delay in getting out certain work caused by lack of power to run his machinery on said occasions; but it does not appear that he at any time made any demand on plaintiff for any definite amount, as damages, until he filed his claim of set-off in this action. He further testified that after his power was shut off in March, 1911, for the cause above mentioned, he requested that plaintiff give him a credit on the succeeding month's rent, but that plaintiff refused so to do, and he continued to pay his rent. He further testified that, in a conversation had with the president of the plaintiff company after the cessation of power in October, 1911, the latter agreed to allow him to occupy the premises for a short period of time after November 1st. The latter flatly denied making any such agreement with him.

We cannot say that the finding is against the weight of the evidence.

Neither can we say that under the terms of the verbal lease, as shown by the evidence, plaintiff was required to furnish power to defendant at all times during working hours while defendant was a tenant. On the contrary, it seems to us that plaintiff

was only to furnish to defendant such power as it had, and that in case of an unavoidable break-down in plaintiff's power plant plaintiff could not be held liable to defendant for any damages sustained by him, if any, occasioned by the temporary cessation of power.

By the correspondence had between the parties in September, 1911, it appears that defendant, who was a tenant from month to month, was notified that if he occupied the premises after November 1st, the rent would be at the rate of $115 per month payable in advance. Defendant did not move out until about November 10th, although he had notified plaintiff he would do so on October 31st, and we think that, under the facts shown, the court was fully justified in holding that defendant was liable for one month's rent at said rate.

The judgment is accordingly affirmed.

AFFIRMED.

184 I.A. 618

ANNA DRAGO,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is taken to reverse a judgment for $1,091.67, rendered in a first class suit in the Municipal Court of Chicago upon the verdict of a jury, in favor of Anna Drago, plaintiff below, and against The Prudential Insurance Company of America, a corporation, hereinafter referred to as the Company, defendant below. The action was in assumpsit upon a policy of life insurance, claimed to have been issued and delivered by the Company, upon the life of Marian E. Baum to the amount of $1,000. Plaintiff, the mother of Baum, was the beneficiary named in the policy.

In plaintiff's amended statement of claim it is alleged that her claim is for $1000 "due under term insurance, dated November 27, 1909, and countersigned December 28, 1909, and issued in connection with policy No. 1136096, said term insurance and said policy issued by defendant upon the life of Marian E. Baum, and payable to plaintiff as beneficiary". The main ground of defense, as stated in the affidavit of merits and as relied upon at the trial, was that the Company "never entered into any contract for insurance of any kind on the life of Marian E. Baum, and never issued or delivered the 'term insurance' or the policy mentioned in plaintiff's statement of claim".

On November 13, 1909, Baum, at the solicitation of Fred M. Wadie, an agent of the Company in Chicago, signed an application

for a twenty year endowment policy for $1000, and paid Wadie the sum of $2 on account of the first annual premium of $42.96. The application specified that the premium was to be paid annually, that the insurance money in case of death was to be paid to Anna Drago, mother, and that the policy was to be dated February 15, 1910, and also contained the agreement that the statements and answers to the questions in said application, as well as the statements and answers made or to be made to the Company's medical examiner, should constitute and become a part of the contract of insurance applied for, and that the policy herein applied for "shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health is in the same condition as described in this application." The declarations made to said medical examiner were signed by Baum on November 17, 1909. Wadie testified that when Baum signed the application on November 13th, Baum stated that he did not then have the money to pay the first annual premium in full, but would have the same by February 15th; that that was the reason why it was stated in the application that the policy to be issued was to be dated February 15, 1910; that when he (Wadie) took Baum's application and received $2 from Baum he gave Baum the receipt dated November 13th, which was introduced in evidence by plaintiff and was to the effect that the Company had received $2, "being a payment on account of the first premium on a policy applied for"; that immediately after receiving Baum's application he turned it into the local office of the Company to be forwarded through the medical examiner to the home office, and that he never saw Baum again. It also appears from the evidence that on December 8th Wadie wrote Baum that he had "passed the doctor" and could have his policy at any time; that the home office, by mistake, executed and forwarded to the local office a twenty year endowment policy for $1000, No. 1138098, dated November

27, 1909, providing for the payment of the annual premium on or before February 15th in each year, which policy was returned to the home office for correction; that in the meantime Wadie, of his own motion and without the knowledge or consent of Baum, requested that there be attached to the policy, which was finally to be issued and dated February 15, 1910, a "term insurance agreement" by which, in consideration of the payment of the premium of $2.50, the Company, "upon delivery of this policy", would agree to pay the amount of the policy if Baum should die prior to said February 15th, and that Wadie, in order to make up this premium of $2.50 for said term insurance, took the $2 which had originally been paid him by Baum, added 50 cents out of his own pocket, turned the same into the local office, and received from that office a preliminary insurance receipt, countersigned December 28, 1909, to the effect that the Company had received "on policy No. 1136096, * * * the term insurance premium, $2.50", on the life of said Baum. It further appears from the evidence that the home office made out a new twenty year policy, No. 1136096, dated February 15, 1910, to which was attached as a rider the "term insurance agreement" mentioned, and forwarded the same to the local office at Chicago together with another paper, entitled "Request for Amendment of Ordinary Policy Contract", to be signed by said Baum, which paper when so signed would give authority to the Company to change "anniversary date from November 27, 1909, to February 15, 1910, by charging term insurance".

In the meantime Baum had left Chicago and he went to California, where he died on January 15, 1910. The said policy, dated February 15, 1910, never got into the possession of Baum. At the time of the trial it was in the possession of the local office of the Company and was produced in court by James R. Ireland, general manager of the local office, in answer to a subpoena.

Plaintiff's theory of the case was that a delivery of the policy to Baum personally was not necessary and that the delivery to the agent, Wadie, was a sufficient delivery in law. Wadie testified that, after said policy, dated February 15th, together with said other paper entitled as aforesaid, had been received from the home office by the local office, both papers were given him by the witness, Ireland, with certain instructions. He was not allowed by the court, in answer to appropriate questions, to testify what those instructions were. The attorney for the Company sought to show by Wadie that, acting under those instructions, he was to personally see Baum, procure his signature to said other paper and satisfy himself that Baum then appeared to be in good health, before delivering the policy to Baum, - in other words, that the delivery of the policy to Wadie was not an unconditional delivery. And the court also refused to allow the witness, Ireland, to testify as to what the instructions given to Wadie at the time were.

Wadie further testified that, about two weeks after Baum's death and after he had been informed of that fact, he delivered the above mentioned term insurance receipt, which he received as aforesaid from the local office and which was countersigned December 26th, to a man named Posten for the plaintiff, and that, about three weeks after Baum's death, he signed a receipt as agent of the Company and delivered the same to Posten for plaintiff, to the effect that the Company had received from "M. Baum" the sum of "30 cents bal. on term", which receipt he ante-dated as of December 27th.

The trial court gave to the jury with others the following instruction, to which the attorney for the Company objected and excepted:

> "The court instructs the jury that an unqualified acceptance of the application for insurance and placing the completed policy in the hands of an agent for delivery

without condition, completes the contract, and if in this case you find that the defendant insurance company accepted unqualifiedly the application of Marion E. Baum for term insurance and placed the completed term insurance policy into the hands of F. H. Wadie for delivery without condition, and that the said F. H. Wadie was an agent of said defendant insurance company, then the contract for term insurance was complete without any further acts, and the defendant company is bound by its contract of insurance."

Under the facts of this case and in view of the above instruction, we are of the opinion that the trial court committed error, prejudicial to the Company, in not allowing the witnesses Wadie and Ireland to testify as to what instructions were given Wadie by the Company when the policy was put into his hands. This was competent evidence to be considered by the jury in connection with all the other evidence. "Delivery is a question of intent". (Jordan v. Davis, 108 Ill. 336, 341; Bryan v. Wash, 2 Gilm. 557, 566; McDonald v. Minnick, 147 Ill. 351, 356.) While it is true that "an unqualified acceptance of the application and placing the completed policy in the hands of an agent for delivery, without condition, completes the contract", (Rose v. Mutual Life Ins. Co., 240 Ill. 45, 51) yet such acceptance must be unqualified and such placing of the completed policy must be without condition. (25 Cyc. 719; Hartford Fire Ins. Co. v. Whitman, 79 Ohio St. 313, 319; Schwartz v. Germania Life Ins. Co. 18 Minn. 448; McCully's Adm'r. v. Phoenix Ins. Co., 18 W. Va. 705; Waters v. Security L. & A. Co. 144 N. C. 863, 870.)

And we think that the giving of the instruction mentioned was prejudicial to the Company. It assumes that Baum made an application for term insurance. The Company contended at the trial that he did not make such an application, but only an application for a twenty year endowment policy to be dated February 15, 1910. Whether he made an application for term insurance was one of the questions of fact for the jury to decide under all the evidence.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

263 - 18725.

184 I.A. 620

MICHAEL DAVRANGIS,
Defendant in Error,

vs.

PETER OLFF, SAMUEL B. OLFF and ARTHUR OLFF, doing business as PETER OLFF & SONS,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HADLEY DELIVERED THE OPINION OF THE COURT.

In October, 1910, the plaintiff below was engaged in the laundry business and used in connection therewith two horses and two laundry wagons, etc., which were kept in a livery stable in Chicago conducted by defendants, who were also in the business of buying, selling and trading horses. On October 17th, the defendants having refused to deliver the horses and wagons to plaintiff on demand, plaintiff tendered to defendants the sum of $25.50, then due them for board and keep, which defendants refused, and on the following day plaintiff commenced an action in replevin to recover certain chattels, which were stated in the affidavit to be "one bay horse * * one blaze horse" and two wagons and two sets of harness. The writ was returned unexecuted by the bailiff, and on November 7th, plaintiff commenced the present action against the defendants in the Municipal Court of Chicago, which was also an action of the fourth class in replevin, to recover the possession of "two bay horses", two laundry wagons and two sets of harness, all of the alleged value of $900. The writ was returned unexecuted and showed that upon demand of the bailiff the defendants refused to turn over to him the property. Subsequently all of the defendants entered their appearance and plaintiff tendered to defendants in open court the said sum of $25.50 which was refused. Subsequently

plaintiff was given leave to change the form of action from replevin to trover and filed a count in trover. On December 9th, 1910, the case was tried before a jury, resulting in a verdict finding the defendants guilty of having maliciously, and with intent to defraud plaintiff, converted to their own use the said property of plaintiff, and assessing plaintiff's damages at the sum of $588.50. A new trial was granted, and on October 4, 1911, the second trial was commenced. The transcript of the record discloses that the plaintiff deposited with the clerk of the court the sum of $25.50 as a tender to defendants. The second trial resulted in a similar verdict against the defendants and plaintiff's damages were assessed at the sum of $468. Another new trial was granted, and on May 2, 1912, the third trial was begun, which resulted in the jury returning a verdict, May 8, 1912, finding the defendants guilty of having maliciously and with intent to defraud plaintiff converted to their own use the property of plaintiff described in plaintiff's affidavit, and assessing plaintiff's damages at the sum of $543.75. Defendants' motion for a new trial was denied and judgment was entered upon the verdict, which judgment the defendants by this writ of error seek to reverse.

The main contentions of the defendants on the trial were that on June 1, 1910, the defendants traded with plaintiff a black horse owned by them for a bay horse owned by plaintiff and $125 in addition, that defendants claimed no ownership in the property but held the same by reason of the statutory lien of stable keepers, and that on October 17, 1910, plaintiff owed defendants for board, expenses, etc., the sum of $150.50. Plaintiff claimed that on said date he was indebted to the defendants only in the said sum of $25.50, so as aforesaid tendered to the defendants.

It appears that the trial court after instructing the jury orally submitted to the jury six questions which they were requested to answer in addition to returning their general verdict. Four of these questions and the special findings of the jury thereon were as follows:

"1. Was the plaintiff indebted to defendants for board of horses on October 17, 1910 for more than $25.50? No.

4. Was the plaintiff indebted to defendants on purchase price of a black horse on October 17, 1910? No.

5. How much was plaintiff indebted to defendants for board, feed and keep on October 17, 1910? $36.50

6. Did plaintiff trade his bay horse for defendants' black horse? No."

Many points are urged by counsel for defendants as grounds of reversal. We have carefully considered them in connection with the abstract of the voluminous record. We do not think that the verdict and judgment are excessive or contrary to the law and the evidence, or that the verdict is against the weight of the evidence. We think that a sufficient tender was made by plaintiff to defendants before the suit was commenced and that the same was sufficiently kept good, and that the court's oral instructions were substantially correct and not misleading. As to the rulings of the trial court on the admission of certain evidence, complained of by counsel, we do not think any substantial errors were committed such as warrant a reversal of the judgment. (Par. 7, Sec. 23 Municipal Court Act.)

The judgment is affirmed.

AFFIRMED.

262 - 18734.

EMMA THIELE,
Plaintiff in Error,
vs.
JOHN HETZEL,
Defendant in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

184 I.A. 633

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was injured in an accident which occurred on April 21, 1909, at or near the intersection of Wellington and Clark streets, in the city of Chicago. She commenced this action against the defendant in error, John Hetzel, and the Chicago Railways Company. After the commencement of the action, for a consideration of $200, she entered into a "peace covenant" with the Railways Company, and the Railways Company was dismissed from the case, and it was tried with the defendant in error, Hetzel, as the sole defendant. Hattie E. Balsley, who was standing by the plaintiff in error at the time of the accident, was also injured. Mrs. Balsley commenced a suit against the defendant in error Hetzel, and secured a verdict and judgment in her favor. This judgment, on appeal, came before this court for review, and the judgment of the lower court was affirmed by this court. (Hattie E. Balsley v. John Hetzel, No. 10008 - Opinion Filed October 6, 1913.) The evidence in the case now before us was substantially the same as the evidence that was presented in the Balsley case, save that the defendant in error in the present case presented one witness as to the accident that did not testify in the Balsley case. Plaintiff in error avers in her declaration that on April 21, 1909, the defendant, Chicago Railways Company, was possessed of, owned, controlled and used certain street car tracks and right of way,

and thereon owned, managed, operated and propelled certain street cars over Clark street, a public highway, and that the said Railways Company was a common carrier of passengers for hire; that the defendant, Hetzel, owned, controlled and drove a certain wagon drawn by horses; that on the day aforesaid, the plaintiff in error was standing at the intersection of Clark street and Wellington avenue, at a usual and customary stopping place for passengers for said Railways Company's cars; that she was in the exercise of ordinary care for her own personal safety at the time, and that she signalled one of said Railways Company's south bound cars on south Clark street to stop for the purpose of becoming a passenger thereon; that the said Railways Company so carelessly and negligently managed and operated its said street car in a southerly direction along and over said Clark street, and the said defendant Hetzel so carelessly and negligently managed, controlled and drove the said wagon in a southerly direction along said Clark street at the place aforesaid, that by and through the carelessness and negligence of the said defendants as aforesaid, a collision occurred between said wagon and said car, and that as a direct, immediate and proximate result thereof, said wagon was knocked, forced and thrown towards the curb and sidewalk of said Clark street, and toward and upon the place where plaintiff then and there was on said public highway, in the exercise of due care as aforesaid, and that as a direct and immediate consequence thereof a collision occurred between said horses and wagon and said plaintiff, and the plaintiff was then and there and thereby knocked, thrown and fell upon the ground with great force and violence, and the horses stepped upon plaintiff and the wagon struck and passed over plaintiff, and the plaintiff thereby sustained injuries, etc. On the trial, the theory of the plaintiff in error was that she

and Mrs. Balsley were standing on the southwest corner of Clark and Wellington streets (at a usual and customary stopping place for passengers), for the purpose of boarding a south bound street car on Clark street; that she saw a street car coming south on Clark street and signalled it to stop and that it came to a stop at the crossing where she and the other lady were waiting to take the car; that the driver of the Hetzel wagon had been following the car, the wagon moving south wholly or partly on the south bound track; that about the time the car was coming to a stop at the crossing the horse and wagon, moving rapidly, turned out from the track behind the car, the intent of the driver of the horse and wagon being to pass the car and to get in front of the same, and that in some manner the left hind wheel of the wagon collided with the rear step of the car, causing the wagon to tilt, and the horse to swing to the west and to run upon the sidewalk, striking plaintiff. The theory of the defendant in error was that as the horse and wagon approached the intersection in question, they were being driven south in Clark street and just west of the south bound car tracks; that when Wellington street was reached a wagon belonging to Carson, Pirie, Scott & Co. was opposite the defendant in error's wagon and to the west of it, and that the defendant in error's wagon was prevented from moving more to the west because of the position of the Carson, Pirie, Scott & Co. wagon; that a south bound street car approached the wagon from the rear at such a high rate of speed as to indicate that it would not stop at the crossing at the south side of Wellington street; that in passing the wagon the rear step of the car (which step projected several inches beyond the west side of the car) caught the left rear wheel of the wagon and threw the horse and wagon toward the curb and sidewalk, and upon plaintiff; that as the car went by the wagon,

but before the collision, the driver saw the two women standing on the crossing and signalled for them to step back, and that when he saw the women were not responding to his signal to step back he stopped the wagon, but the hind step on the right side of the car struck the left rear wheel of the wagon and caused the wagon and horse to be thrown towards the sidewalk and against the women.

A number of witnesses testified in support of each theory. The plaintiff in error insists that the plaintiff in error sustained her case by a preponderance of the evidence. From an examination of the evidence in the case, we are satisfied that if a verdict had been found by the jury in favor of the plaintiff in error it would have been amply supported by the evidence in the case. The jury that heard the evidence in the case of Mrs. Baisley returned a verdict in her favor against the defendant Hetzel. This fact, of course, has no controlling effect on our action in this case.

The plaintiff in error challenges the correctness of many of the instructions given by the trial court at the request of the defendant in error. In the view that we take of the evidence in the case, it becomes necessary for us to examine with care the complaints made by the plaintiff in error as to the instructions in the case.

The plaintiff in error challenges the correctness of instruction No. 14, given at the instance of the defendant in error. The instruction reads as follows: "14. If the evidence in this case preponderates in favor of the defendant, then your verdict should be not guilty. Or, if the evidence fails to preponderate in favor of plaintiff, the jury should find the defendant not guilty. Or if the evidence in the case is evenly balanced, the jury should find the defendant not guilty." An instruction,

materially the same but slightly different in phraseology, was condemned by this court in the case of Nelson v. Chicago City Railways Co., 165 Ill. App. 68. In that case, the court speaking of the instruction, said: "This instruction was condemned in Chicago West Division Ry. Co. v. Lambert, 119 Ill. 256, 268, because it did not restrict the evidence referred to, to the issues essential to the maintenance of the action. The jury might apply the instruction to evidence on points in dispute which were not essential and thus be misled by it. The instruction approved in Harvey v. C. & A. Ry. Co., 221 Ill. 242, confined the evidence referred to therein to points material to the plaintiff's case." The instruction is also subject to the criticism that it too frequently uses words to the effect that the jury should find the defendant not guilty. Mr. Justice Adams, in the case of West Chicago Street Railway Co. v. Lupa, 74 Ill. App. 462, in speaking of a similar instruction, says: "It is also obnoxious to criticism on account of the frequent repetition of the words 'you should find the defendant not guilty'. Such iteration and reiteration of those words in a single instruction, might induce in the minds of the jury the impression that the court would favor a verdict of not guilty." In instruction No. 14, the defendant in error has artfully contrived in a very short instruction to have the court thrice use the words "your verdict should be not guilty". Instruction No. 14 is not the only one in this case in which this vice appears. From the record in the case it appears that in the instructions given for the defendant in error the words "you should find the defendant not guilty" or practically similar words are used seventeen times. The purpose of the defendant in error in framing the instructions in this way is obvious. The practice is an old one in personal injury cases. In speaking of this practice,

Mr. Justice Frederick A. Smith, in the case of Nelson v. The Chicago City Railway Co., supra, says: "Our attention is called to the fact that the court gave twenty-nine instructions requested by defendant, and to their form and to the repetition of the direction to the jury in various ways to find the defendant not guilty; and it is urged that the instructions as given amount to a well prepared argument for the defendant. * * * In each instruction requested by the defendant, numbered respectively 21, 22, 23, 26, 28 and 29, the direction is given the jury to find the defendant not guilty, and in three of these instructions the form of the verdict is given. This is only another way of emphasizing the words 'not guilty' and is as effective, if not more so, as printing the words in large type - a practice condemned in Elwood v. Chicago City Ry., 90 Ill. App. 397, 400. Considering the great number of instructions, the character and number of the repetitions of the same idea in them, we think they were well calculated to impress the jury with the thought that the court was against the plaintiff on the question of fact and that they might readily be misled to believe that in the opinion of the court they should find for the defendant. No legitimate reason appears for the repetition of the direction to find the defendant 'not guilty' so frequently". We have no doubt that verdicts are sometimes forced from juries through this highly improper practice. The present case is one in which the practice may have worked to the serious injury of the plaintiff in error. Hattie Balsley, a witness in this case, was injured at the same time and in the same manner as the plaintiff in error. Mrs. Balsley sued the defendant in error and recovered a verdict and judgment against him, and the judgment was affirmed by this court. (Hattie M. Balsley v. John Metzel, No. 10005 - Opinion filed October 9, 1918.) The evidence in the Balsley case varied but little from the evidence

in this case, and while we recognize the fact that the finding of the jury in the Kalsley case should not control our action in this case, nevertheless, the verdict of the jury in that case, sustained as it was by the judgment of this court, is a circumstance in support of the contention that this case was peculiarly one in which the trial court should have fairly and accurately instructed the jury as to the law of the case.

Plaintiff in error complains of instruction No. 16, given at the request of the defendant in error. The instruction reads as follows: "16. The court further instructs you that at and just before the time of the accident in question the trolley cars operated upon the Clark street tracks had no rights upon any particular street at and within the intersection of Clark and Wellington streets superior to the rights of the defendant's wagon." This was a suit between the plaintiff in error and the defendant in error, the owner of the wagon in question, and not a suit between the defendant in error and the street car company. The street car company was not even a party to the suit. The relative rights of the Railways Company and the defendant in error "at and within the intersection of Clark and Wellington streets" were not involved in this case. It was not the province of the jury to compare and determine the conduct of the defendant in error with the conduct of the employees of the street railway company. The question for the jury to determine in this case, so far as the defendant in error was concerned, was, was the defendant in error guilty of the negligence charged in the declaration? Assuming, for the purpose of the argument, that the defendant in error in this case, as a matter of law, had all the rights at the time and place in question the instruction gives him, still, that fact would not absolve him from the consequences following an injury to the plaintiff

in error if the driver of his wagon, at the time and place in question, was guilty of the negligence charged in the declaration. Wolf Mfg. Co. v. Wilson, 162 Ill. 9-16; Chicago Railways Co. v. Lennon, 218 Ill. 477.

The jury might well have assumed from this instruction that the defendant in error at the time and just prior to the accident in question was acting within his rights, so far as the Street Railway Company was concerned, and that, therefore, this fact tended in some way to excuse the defendant in error from the consequences of the accident to the plaintiff in error.

Plaintiff in error complains of instruction No. 18, given to the jury at the request of the defendant in error. This instruction reads as follows: "18. The jury are instructed that while the law permits the plaintiff in the cause to testify in her own behalf, nevertheless the jury have the right, in weighing her evidence, to determine how much credence is to be given to it and to take into consideration that she is the plaintiff and interested in the result of the suit." The plaintiff in error and defendant in error were both individuals, and both testified in the case. The instruction in question was before this court for review in the case of Sangster v. Hatch, 124 Ill. App. 340, 342. The court in passing upon the instruction said: "The twenty-sixth instruction should not have been given. Appellee, as well as appellant, was a witness in the case, but the instruction identifies appellant and directs the attention of the jury to her situation and interest in the result of the case, without any reference to the situation and interest of appellee in the result of the case. The instruction was calculated to impress the jury with the thought that the court entertained some special reason for discrediting the testimony of appellant,

which did not apply to the testimony of appellee. The instruction should have been so drawn as to apply to either party to the suit without designating either. C. & E.I. R.R. Co. v. Burridge, 211 Ill. 9; Taylor v. Cross, 122 Ill. App. 518."

Counsel for plaintiff in error seek to evade the effect of the giving of this instruction in this way. Counsel insists that the defendant in error, Hetzel, did not testify on any disputed point in the evidence, and that, therefore, this court in passing upon this instruction should consider the case as though the defendant in error Hetzel had not testified in the case at all. It is a sufficient answer to this contention to say that the record does show that the defendant Hetzel did testify on a disputed point of evidence in the case. While it is true that the witness Hetzel did not claim to have seen the accident in question, still, he did testify to circumstances tending to sustain the theory of the defendant in error as to how it happened. This theory was in conflict with the theory of the plaintiff in error. The testimony of Hetzel was deemed important evidence by the defendant in error, at the trial of the case.

Plaintiff in error complains of instruction No. 10, given to the jury at the request of the defendant in error. The instruction reads as follows: "10. If you should find that the Chicago Railways Company and the defendant were liable to the plaintiff for the injuries sustained by her in the accident in question, then you can only allow as damages such damages, if any, as the plaintiff has sustained in excess of the sum of $200, the amount shown to have been received by the plaintiff from the Chicago Railways Company; and unless the plaintiff has proven by a preponderance of all the evidence that she has sustained damages in excess of $200, then the plaintiff cannot recover anything in this action, and your verdict must be not

guilty." In the case before us the plaintiff in error, in consideration of the payment to her of $300 by the Chicago Railways Company, entered into a covenant with the said Company not to sue the said Company because or on account of the accident in question. This case had been originally commenced against the defendant in error and the Chicago Railways Company, but as a result of the covenant in question, the Railways Company was dismissed from the case and the case was tried with John Hetzel as the sole defendant. The law announced in instruction No. 10 is in direct conflict with the law on the same subject in the case of Beverey v. Otis Elevator Co., 251 Ill. 29-36. In this case, the Supreme Court said:

> "Plaintiff in error complains that the court erred by giving instruction No. 2 for the defendant in error. This instruction, after stating the rule for estimating the damages in case the defendant in error was entitled to recover, proceeds to inform the jury that from the amount of actual damages sustained should be deducted $375 paid by the Otis Elevator Company, provided the jury believe that the Otis Elevator Company was jointly guilty with the plaintiff in error of the negligence that caused the injury and the jury were also informed that if the Otis Elevator Company was not guilty of negligence which approximately contributed to the injury, the $375 should not be deducted from the actual damages sustained by the defendant in error. This instruction had no proper place in this case and should not have been given. It improperly submits to the jury the issue as to whether the Otis Elevator Company was guilty of negligence in connection with the injury when no such issue was made in the pleadings. The Otis Elevator Company was not a party to this suit, and it was improper to submit the question of its responsibility for the injury to the jury by this instruction. The $375 paid the defendant in error by the Otis Elevator Company was not paid as part compensation for the injury he received. It was paid for a covenant not to further prosecute the suit against that company. The jury had nothing to do with that question and the instruction should not have been given. The $375 paid by the Otis Elevator Company could not be considered by the jury in part payment of defendant in error's damages. While the instruction is erroneous for the reason stated, we cannot see how it could have misled the jury to the prejudice of the plaintiff in error. It told the jury that under certain circumstances the $375 should be deducted from the amount of damages plaintiff had sustained. If the jury found the facts upon which this instruction is predicated as therein stated, the effect of the instruction was to

reduce the damages $375, and in this view it would be favorable to the plaintiff in error. If, on the other hand, the jury considered that the Otis Elevator Company was not jointly guilty of negligence with plaintiff in error, they are instructed to disregard the payment of $375. This part of the instruction simply told the jury what they should have done independently of the question of the participation of the Otis Elevator Company in the wrong complained of. The rule in regard to joint tort feasors is that each wrongdoer is responsible for the whole amount of damages, and that there is no such thing as apportioning the damages among joint wrongdoers. This instruction was improper and should not have been given, but we are of the opinion that it ought not to lead to a reversal of the judgment."

Counsel for defendant in error strenuously insists that as the Supreme Court in the case mentioned, held that the instruction before it for consideration was not prejudicial to the rights of the appellant in that case, that all that the court said with reference to the law of the instruction must be regarded as obiter. There is no merit in this contention. The Supreme Court in the last mentioned case squarely passed upon the law of the instruction in question. Counsel for defendant in error also insists that this court should disregard the ruling in the case of Devaney v. Otis Elevator Co., supra, even if this court should be of the opinion that the point in question was squarely passed upon by the Supreme Court, for the reason, as counsel contends, that the ruling in the case of Devaney v. Otis Elevator Co., supra, is bad law and is opposed to all the well adjudicated cases on the subject. While we do not agree with the contention, that the law laid down in the last mentioned case is not good law, it is sufficient to say, in answer to the contention of counsel, that the case of Devaney v. Otis Elevator Co., supra, is the law of this State and is binding upon this court. It cannot be said in the present case that the giving of instruction No. 19 was not prejudicial to the rights of the plaintiff in error. The defendant in error vigorously contested the claim of the

plaintiff in error that she was seriously injured as the result of the accident in question. It may well be, therefore, that the jury in this case, found from the evidence that the Chicago Railways Company and the defendant Hetzel were liable to the plaintiff in error for the injuries sustained by her in the accident in question, but that the damages the plaintiff in error sustained were not in excess of the sum of $200. If the jury found that the damages sustained were not in excess of $200, under instruction No. 19 they were told to find the defendant not guilty. The instruction, therefore, may have been prejudicial to the rights of the plaintiff in error.

For the reasons indicated in this opinion, the judgment of the Superior Court of Cook County will be reversed and the cause will be remanded for a new trial.

REVERSED AND REMANDED.

278 - 18740.

184 I.A. 635

PEOPLE OF THE STATE OF ILLINOIS, for use of the STATE BOARD OF HEALTH,
Defendant in Error,
vs.
JASPER B. McTIER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

STATEMENT OF FACTS.

This is an action of debt brought in the Municipal Court of Chicago by the People of the State of Illinois, for the use of the State Board of Health, against the plaintiff in error, to recover the statutory penalty of $100 for practicing medicine without a license. The plaintiff in error waived a trial by jury. The court heard the evidence and found the plaintiff in error guilty and imposed a fine of $100 and costs and entered judgment for that amount, and ordered that the plaintiff in error stand committed to the county jail for a period not exceeding thirty days, unless the fine was paid. This writ of error is sued out to reverse the judgment of the court.

It appears from the evidence that the plaintiff in error, living in the city of Chicago, had caused to be distributed from house to house the following circular:

> "Are you sick? Do you know of any one that is sick? if so send them this chain of information. Do not burn this tract or destroy it in any way. The men or women that do it, need never expect any more blessings as long as he or she live in the body. This tract is printed and sent out for no other purpose than to find the sick and sorrowful, that they may be healed and made well by the 'Healing Water' so I warn you who receive it in any way left at your door or sent to you through the mail not to destroy it, because it is the word of God sent to you in this way that you may help the sick and needy. There is only three ways to get

sickness, namely: 1.) To inhale it in your lungs. 2.) draw it through the skin. 3.) To be immoral with the opposite sex. All diseases that start in through the skin, never stop until it reaches the marrow of the bones going in through the flesh and through the bones, when it reaches the marrow, that is the center of your being. When the disease reaches the marrow in the bones the Doctors say you are incurable and tell you so, and many give up to die because they do not see anything else to do but to die. If you are sick and this tract or chain of information comes to your hand, say right from that moment, I will get well, and you will, because God will heal you through the name of Jesus and with 'Healing Waters'. All the diseases that have been caused through the skin must be drawn out through the skin, because that is the way it went in. All diseases of the lungs must be ejected through the mouth, because it was inhaled through the nostrils. You may want to know if 'Healing Waters' will cure any and all diseases or the causes of diseases, Yes, I take a small linen handkerchief and bless it and send it to you right away. You take this handkerchief and pin it to your flannells right over the abdomen and wear it there. Take a quart of water and put it in a bottle. Blow your breath in the bottle three times, in the name of the Father, Son and Holy Ghost, and you will have the 'Healing Water'. Now take a sponge bath with this water every day for a week, then after that every other day or night which ever is best for you. As you take the bath call the diseases out mentally by name in your mind tell it to come out in the name of the Father, Son and Holy Ghost, in a little while you will find yourself getting stronger and well.

Now, for Lung disease and Disease of the Throat. Don't take another drop of Dope for such sickness because it does not do any good. The dope does not go into the lungs, but it goes in to the stomach and passes out like anything else you put in it. Send to me for a blessed handkerchief, wear it across your chest and I will write you the words to say in your mind, as you take long breaths and words to say, so you let out the breath with affirmation in a little while you will find yourself getting well. If you will send me your name and I will pray for you each day. Send me a small picture of yourself it will help me to help you to recover faster. Yes, help me to heal ten thousand people this year, help me to cure you, I know what I say is true. You may want to know how much it will cost you, it will cost you love for the sick, wishing them well, wishing yourself well. If you are able to send us money to pay for printing and other expenses do so and God will bless you, we will receive anything from you, from $1.00 and upwards.

Mothers, if you will do what I tell you, you will never lose your baby or large children, no matter what the child's sickness is. I will give you the secret in part, take your sick child in your lap look it deep down in the eyes and repeat the mystic words of mighty power, open the child's mouth, blow your breath three times in the child's mouth in the name of the Father the Son and the Holy Ghost and from that hour your child will begin to get well.

of

Mothers and Fathers, if you or any of your friends have the consumption and cough, can not sleep, can't eat have lost flesh, I will tell you what to eat and drink with the instructions above, and you will breath well, and eat well and get fat. My friend, I have nothing else in view but to get God's people well. Will you help me? I warn you again, do not destroy this tract, take a one cent stamp and put it on an envelope and put this tract in it, and mail it to some one that is sick, if you do not know anyone that is sick, send it to some one and when he receives it he must do likewise, do not say a word against it because you don't know anything about it. All persons wishing information on anything must send a stamped and addressed envelope, this must be done that your letter will not go bymistake to a wrong address. I expect you to help me with your prayers and money, and I will heal you.

Just put a green back dollar or more, in an envelope and mail it to me.

REV. DR. J. B. McTIER, D. D.
3217 LaSalle Street Chicago, Ill."

The State Board of Health, learning of the distribution of the circulars by the plaintiff in error, through its attorney, Mr. Alling, sent two female employees to the residence of the plaintiff in error to investigate. These investigators testified, in substance, that they met the plaintiff in error at his home and that one of them said to the plaintiff in error that she came to see him for treatment and that she wished to inquire about his Healing Water, and [illegible] to know if the plaintiff in error could do anything for her; that the plaintiff in error said that he could help her and that he would find out what her ailment was, but that she would have to do exactly as he told her; that he then told the two investigators to sit down and close their eyes: that plaintiff in error then told the investigator who had consulted him to repeat after him the following words: "In the name of the Father and the Son help me to find out what this lady is suffering with"; that he then stated that the lady was suffering with stomach trouble; that he then said to her "I will get you the Healing Waters but you must keep your eyes closed or the spell will be broken; that he then went to some place in the house and on his return he

brought with him a bottle of water and handed it to her, saying at the time, "this is the Healing Water"; that he then directed her to saturate a linen handkerchief with the water and to place the handkerchief on her stomach at night; that when she did this she should use the following language: "in the name of the Father and the Son help the doctor try to heal me"; that she then asked the plaintiff in error what his charges were and he said one dollar; that she paid him the dollar; that she then showed him a circular and asked him if it was his advertisement and he said that it was; that he stated that he sent the circulars around and that many people called. The two investigators further testified that they called a second time on the plaintiff in error a few days after the first visit and that substantially the same things happened on the second visit as had occurred on the first visit; that they received from the plaintiff in error a bottle of water on each visit; that the water had a sweet smell; one of the investigators stated that on the occasion of the second visit the plaintiff in error treated with his hands the head of the investigator who had consulted him. The investigators admitted that neither of them required medical attention. The circular that the investigators testified they showed to the plaintiff in error on the occasion of their first visit was introduced in evidence.

On behalf of the plaintiff in error, plaintiff in error testified that he was a minister of the gospel; that he was ordained by John Alexander Dowie; that he had no diploma or certificate to preach; that he had never studied for the ministry; that he had only three months schooling in his life; that he was in charge of a mission at 47th and Armour avenue, which was supported by offerings; that he kept no track of the members of his congregation; that he had caused circulars like

the one that had been introduced in evidence in the case to be printed and distributed from house to house; that he did not profess to treat physical ailments; that he gave people advice what to do and how to pray; that he did not try to diagnose sickness; that he simply prayed for the sick; that he did not give anyone liquid in bottles, but he told the people how they should make the liquid. The plaintiff in error further testified that he had never seen either of the two investigators and he denounced their evidence as false in toto. Several witnesses testified that they knew the plaintiff in error as a minister and that they had never heard of him treating anybody or professing to treat anybody for sickness or disease.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Counsel for the plaintiff in error contends that the trial court erred in admitting the circular in evidence. No good reasons are advanced nor are any authorities cited in support of this contention. The investigators testified that the circular in question was shown by them to the plaintiff in error when they visited him and that he stated to them that it was one of many that he had printed and distributed, and that people called on him as a result of the distribution of the circulars. On cross-examination the plaintiff in error admitted that the circular in question was one of many that he had printed and distributed. The circular in question tended to support the charge in the statement of claim and it was therefore competent evidence.

Counsel for plaintiff in error insist that the evidence of the two investigators is false in toto. If the testimony of the two investigators is to be believed, it follows that the

plaintiff in error in his testimony is guilty of perjury of the grossest kind. The trial court saw the witnesses and had far better opportunities than we to pass upon their credibility. A careful study of the record, however, satisfies us that the trial court made no mistake in his conclusions on questions of fact in the case.

Plaintiff in error insists that the evidence offered on behalf of the defendant in error, even if it is to be believed, shows that the investigators induced, solicited and procured the plaintiff in error to practice medicine (if it is to be held that the evidence proves that he did practice medicine), and that the plaintiff in error cannot be held legally responsible for any acts he may have committed under such circumstances. In support of this contention appellant cites the case of City of Chicago v. Westergren, ~~[illegible]~~ 173 Ill. App. 562). In this case Mrs. Westergren was prosecuted on a charge that she unlawfully received and obtained the sum of fifty cents from one Peter Sickokis by fraudulent devices and practices in the name of or by means of spirit mediumship, fortune telling, etc. The evidence in the case showed that Sickokis was a police officer and that he called on Mrs. Westergren for a reading and paid her fifty cents for the same. Sickokis did not rely upon or believe the statements that were made to him by Mrs. Westergren and he was in no manner deceived or defrauded thereby. The Appellate Court held that Mrs. Westergren, under the evidence in the case, was not guilty of obtaining money by false pretenses. The plaintiff in error in this case was not prosecuted on a charge of obtaining money from one of the investigators by false pretenses. He was sued on a charge of treating and professing to treat and prescribe certain material remedies for the physical ailment of another person without a license. The evidence shows that the

investigators did not advise or encourage the plaintiff in error to commit the acts forming the basis of the suit in question, but it does show that the State Board of Health, suspecting from the distribution of the circulars that the plaintiff in error was practicing medicine without a license, took proper steps to ascertain if the suspicions of the Board concerning the plaintiff in error were correct. This is a civil case and the strict rules that govern criminal cases do not apply to it, but even in a criminal case, where all the rights of the defendant are carefully guarded, the law is that where one suspects another of a willingness to commit a certain offense, the law does not prevent the one from taking steps to ascertain if the other would commit the offense. To prohibit precautionary steps of this character from being taken would be "to destroy one of the most effective agencies for the detection of crime. If, during the investigation, the party, without encouragement from the investigator, commits a criminal offense, he will be held responsible for the same". Smith v. People, 251 Ill. 189.

Counsel for plaintiff in error insist that the acts of the plaintiff in error did not constitute a violation of the section of the statute in question. To support this contention counsel is forced to assume the truth of certain parts of the testimony of the plaintiff in error to the effect that he did not diagnose or treat disease, and that he simply prayed to cure sickness. In answer to this contention it is only necessary to say that when all the evidence in the case is considered together, it clearly sustains the charge in the statement of claim.

Counsel for plaintiff in errorbinsists that the plaintiff in error, under Art. 2, Sec. 3 of the Constitution of 1870,

had a legal right to pray for the cure of sickness or disease. The correctness of this contention we cheerfully concede. The constitutional provision referred to, however, did not give the plaintiff in error the right to practice medicine without a license. The plaintiff in error was not found guilty in the case because he prayed for the cure of sickness or disease, but because he practiced medicine without a license. The plaintiff in error was a quack of the most ignorant type. He preyed upon the feeble minded and the credulous. His alleged treatment by prayer was a mere pretense, used by him to cloak the fact that he was practicing medicine.

Counsel for the plaintiff in error contends that there is no proof of venue in the record, and he cites the case of Dougherty v. The People, 113 Ill. 180 in support of the claim that the venue must be proven in this case. In the case cited Dougherty was indicted for murder and the Supreme Court held that in criminal cases the venue of the crime must be proven. The present proceeding is not a criminal case, and the rules of criminal pleading and practice do not apply to it. People v. Cartenstein, 248 Ill. 544, 551. The evidence did show that the offense was committed in the City of Chicago.

We find no error in this record, and the judgment of the Municipal Court of Chicago will therefore be affirmed.

AFFIRMED.

October Term, 1912. No.

349 - 18816.

184 I.A. 637

In the matter of the petition of
JACOB WILLIAM MURRAY,
for On appeal of JACOB BREMER,
Appellant,

vs.

WILLIAM MURRAY,
Appellee.

APPEAL FROM
COUNTY COURT
COOK COUNTY.

STATEMENT OF FACTS.

The appellee filed a suit against the appellant in the Municipal Court of Chicago, and at the same time made a demand for a jury trial. In the statement of claim filed by the appellee in that case the appellee charged that he bargained with the appellant to buy of him a first lien deed of trust, with the notes evidencing the debt secured thereby, for the purpose of an investment; that the appellant then and there bargained with the appellee to sell to him a deed of trust and a principal note for $600, secured by said trust deed, together with certain interest notes; all of said instruments being executed by one Marianna J. F. Graham; the said notes and the said instrument being described in detail in said statement. The appellee further avers in said statement that the said securities were in the possession of the appellant at the time of the bargaining, and that the appellant falsely, deceitfully and fraudulently, and with the intent and purpose of inducing the appellee to purchase said securities, warranted and represented to the appellee that said deed of trust was then a first lien and encumbrance of record upon the real estate described therein, and that it was the only mortgage or trust deed encumbrance thereon, and that said trust deed and notes were a good and merchantable

investment and [illegible] the representations and warranties so made [illegible]liant to the appellee were well known by the appellee to be false. The appellee further avers in the said statement that for a long time prior to the said transaction, the appellant was and had been a dealer and broker in mortgages, notes and trust deeds; that the appellee was ignorant and inexperienced in such matters and unacquainted with the means and methods of determining whether mortgage securities were first liens; that he, the appellee, had no knowledge or notice concerning the condition of the title to said real estate, and that he believed and relied upon the representations made by the appellant to him and that he purchased the said securities and paid the appellant for the same. The appellee then further avers that the said trust deed was, as a matter of fact, at the time of the said transaction, not a first lien but a third lien, and that there were at the time of the said transaction two prior trust deeds of record (describing them) and that the said securities so sold to the appellee by the appellant were at the time of the sale, and ever have been, of no value whatever; all of which the appellant at the time of the said bargain and sale well knew; that the holder of the first lien trust deed on the said property, subsequent to the time of the purchase of the said securities by the appellee of the appellant, foreclosed the same and bought in the said property; that said Marianna J. P. Graham, or the appellant, continued to pay to the appellee the interest on the said note purchased by the appellee of the appellant until March 6, 1910, and that the appellee did not learn of the deceit and fraud of the appellant until about July 1, 1910. The statement of claim is verified by the affidavit of the appellee Murray.

The appellant Bremer filed in the case an affidavit of merits, in which he stated that he, as a broker for real estate loans and sales, had an application for a loan of $600 from one Graham upon the real estate in question, and that about the same time said appellee desired to purchase a loan of about the same amount; that he informed the said appellee that he, the appellant, had no abstract of title to the property and had not examined the records; that he advised the said appellee to see the property and the owner thereof and to make such arrangements as would be satisfactory to him, the appellant; that the said appellee personally investigated the matter and directed him, the appellant, to make out the necessary papers, which he did; that the transaction was consummated by the parties to the same and that he, the appellant, did nothing in the premises except to draw the necessary papers. Appellant denied that he made the representations charged by the appellee in his statement of claim, and denied that he had any knowledge as to the character or title to the said real estate, and he averred that he had stated to the appellee that he knew nothing regarding the title to the property and that the appellee would have to determine for himself the facts regarding the title to the property.

Upon the issues so joined the case was submitted to a jury, who returned a verdict finding the appellant guilty as alleged in the appellee's statement of claim, and assessing the plaintiff's damages at $631.07 in tort. The following special interrogatory was submitted by the trial court to the jury:

> "Did the defendant, Jacob Bremer, at the time he negotiated and delivered the notes and the trust deed in question to the plaintiff William Murray, (if the jury believe from the evidence that the defendant did negotiate and deliver the trust deed and notes to the plaintiff) have the malicious and fraudulent intent to deceive and defraud the plaintiff and to obtain his money by the false representation and pretense that the said trust deed

and notes so negotiated and delivered by the defendant to the plaintiff constituted a first mortgage lien on the real estate described therein?"

With their verdict the jury returned an affirmative answer to the said interrogatory. A motion for a new trial was overruled by the trial court and judgment was entered upon the verdict, the court finding and adjudging in the judgment that the appellant, at the time he negotiated the notes and trust deed in question, had the malicious and fraudulent intent to deceive and defraud the appellee by the false representation and pretense that the said notes and trust deed constituted a first mortgage lien upon the real estate described in the trust deed and that malice was the gist of the action.

No appeal seems to have been taken by the appellant from this judgment of the Municipal Court. After he had been arrested on a writ of capias ad satisfaciendum issued upon the judgment he filed a petition in the County Court of Cook County on December 22, 1911, setting up that he had been arrested under a writ of capias ad satisfaciendum issued by the Municipal Court in favor of the said appellee for the sum of [illegible].87, and that he was then in the custody of the sheriff of the county of Cook, under and by virtue of said writ, and that he was desirous of releasing his body from arrest or imprisonment under said writ by scheduling his property under the provisions of the statute relating to insolvent debtors. The appellee, as the arresting creditor, filed an answer to the petition of the appellant, in which answer, as finally amended, he set up in full the proceedings in the case in the Municipal Court and alleged that malice was the gist of the action in that case and that the question as to whether malice was the gist of the action in the case had been determined adversely to the appellant in the Municipal Court and that the appellant was concluded by the

judgment of the Municipal Court from again litigating said issue, and that the petitioner was not an insolvent debtor within the purview of the "Insolvent Debtor's Act" and was not entitled to schedule his property under the said act. On the hearing of the petition of the appellant in the County Court the appellee offered in evidence the record of the case in the Municipal Court. No objection was made by the appellant to the introduction of the record. Counsel for appellant then offered to introduce evidence to show that malice was not the gist of the action in the Municipal Court case. The trial court held that it was clearly apparent from the record in the Municipal Court case that malice was the gist of the action in that case and that the question as to whether malice was the gist of the action in the case had been decided adversely to the appellant in the Municipal Court proceedings, and that the judgment in that case was res adjudicata of the question. The trial court thereupon refused to admit the evidence offered by the appellant, denied the petition of the appellant and remanded him to the custody of the sheriff of Cook County. An appeal to this court was taken from this order of the County Court.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The only assignment of error urged by appellant in this court is that the trial court erred in refusing to allow the appellant to show, by evidence, that malice was not the gist of the action in the Municipal Court case. Counsel for appellant contends that the evidence offered was made competent by the ruling of the trial court in admitting in evidence, on motion of the appellee, the record of the case in the Municipal Court. The appellant made no objection to the admission of the record, but waiving this question, however, we are of

the opinion that the ruling of the trial court in admitting the record and in refusing to allow the appellant to introduce the evidence in question was clearly proper. Either party had the right to introduce the record in evidence. If the record showed that malice was the gist of the action in the Municipal Court case, the judgment of that court would be res adjudicata of the question, and the appellant would not be allowed to introduce evidence to show that malice was not the gist of the action in the case. If the question as to whether or not malice was the gist of the action in the Municipal Court case could not be determined from an inspection of the record, then either party, or both, would be allowed to introduce evidence bearing on that question. The case of Jernberg v. Mix, 199 Ill. 257, is an illustration of a case in which evidence may be offered. In that case there were several counts to the declaration, and malice was the gist of the action in some of them and not of others. It was held in this case that the judgment was not conclusive on the question of malice, for the reason that the verdict might have been returned upon counts which did not include the element of malice. The petitioner in that case was, therefore, allowed to show by evidence that the verdict and judgment were based upon a count where malice was not the gist of the action. If, on the other hand, the question as to whether malice was the gist of the action in the case in which the judgment was rendered, on which the capias ad satisfaciendum issued, can be determined from an inspection of the record, the judgment of that court would be conclusive as to that question, and would be res adjudicata. Jernberg v. Mix, 199 Ill. 254; Siebel v. Luttmann, 147 Ill. App. 638; Rex v. People, 148 Ill. App. 609; Drygalski v. Thiele, 199 Ill. App. 290; Lascher v. Carey (No. 16537 - Opinion filed in this court October 9, 1913).

The Supreme Court in the case of Jernberg v. Nix, 199 Ill. 354, 358, in defining the term "malice", as used in the Insolvent Debtors' Act, uses the following language:

> "The term 'malice', as used in the act in question, applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another. (First National Bank of Flora v. Burkett, 101 Ill. 591; Kitson v. Farwell, 150 Ill. 327.) To entitle a defendant to discharge from imprisonment it must appear that the wrong for which the action was brought was not of that character. The gist of an action is the essential ground or principal subject matter, without which the action could not be maintained."

When the record in the Municipal Court case is subjected to this test, it seems very clear that malice was the gist of the action in that case. The judgment in the Municipal Court case was therefore res adjudicata of the question of malice and the trial court ruled correctly in refusing to allow the appellant to introduce the evidence offered by him.

The judgment of the County Court will therefore be affirmed.

AFFIRMED.

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